



*B. F. Butler.*

BENJAMIN F. BUTLER

*The School of Law of New York University was established in 1835  
on a plan for legal instruction drawn by Benjamin F. Butler,  
Attorney General in President Jackson's and  
President Van Buren's Cabinets*

# LAW

## *A Century of Progress*

### 1835 · 1935

CONTRIBUTIONS IN  
CELEBRATION OF THE 100TH  
ANNIVERSARY OF THE FOUNDING  
OF THE SCHOOL OF LAW OF  
NEW YORK UNIVERSITY

*In Three Volumes*

VOLUME ONE

CONTENTS



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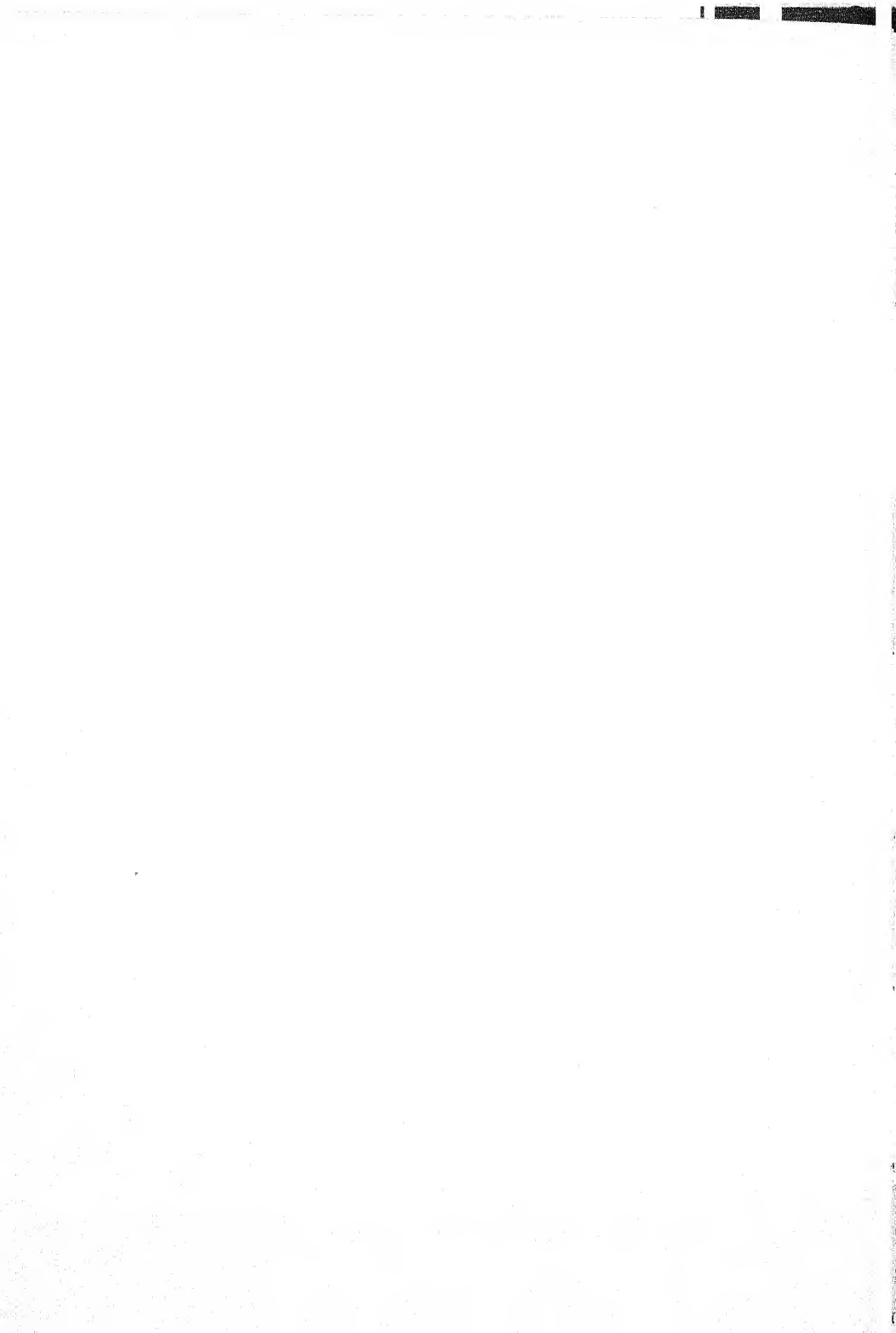
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THESE VOLUMES ARE DEDICATED TO

FRANK H. SOMMER

WHOSE COMPLETION OF FORTY YEARS OF SERVICE AS  
PROFESSOR OF LAW AND TWENTY YEARS AS DEAN OF  
NEW YORK UNIVERSITY SCHOOL OF LAW COINCIDES  
WITH THE ONE HUNDREDTH ANNIVERSARY OF THE  
FOUNDING OF THAT SCHOOL



## EDITOR'S NOTE

THE year 1936 marked the passing of one hundred years since the founding of the School of Law of New York University. In observing the event the Dean and Faculty concluded that it would be fitting, as a part of the celebration program, to issue a Centennial Publication, in which a more or less systematic effort would be made to review the progress of the law during the last century. In this way the growth of the law and its institutions during this important period would be developed and the problems of the future and a method of approach to their solving would be indicated.

These volumes are the result. They are offered, not without hope that a survey of the progress of American law, public and private, extending over the century of New York University School of Law's existence, will furnish a basis on which to carry the development of American law forward. Necessarily, the effort is incomplete, dealing only with a few specific subjects. The treatment of each subject is not technical, but traces the development in broad outline.

If the series of contributions here offered serves to give the reader a clearer conception of what the American people and world at large have accomplished during the past century in the field of jurisprudence and afford a guide for the progress of the law, it will have served its purpose.

ALISON REPPY

*Professor of Law, New York University*



## CONTENTS

Frontispiece	<i>facing page</i> iii
Editor's Note	vii
Biographies of Authors	xv

---

### VOLUME I—*History, Administration, and Procedure*

---

A Century of New York University School of Law	i
FREDERICK E. CRANE Chief Judge of the New York Court of Appeals	
Prefatory Note	6
FRANK H. SOMMER, Professor of Law and Dean of the School of Law of New York University	
A Hundred Years of American Law	8
ROSCOE POUND, University Professor, Harvard University, and Dean Emeritus of the Harvard Law School	
The Progress of Law in the Province of Ontario or Upper Canada During the Past Century	27
WILLIAM RENWICK RIDDELL Justice of Appeal of the Supreme Court of Ontario	
Law and Justice in Latin America	39
PHANOR J. EDER, Member of the New York Bar	
One Hundred Years of German Law	83
WALTER SIMONS Former Chief Justice of Germany	
The History of Legal Education	104
JOSEPH HENRY BEALE Royall Professor of Law at Harvard University	

One Hundred Years of Administrative Law	117
ARTHUR T. VANDERBILT Professor of Law at New York University	
The Profession of Law: Its Present and Future	145
WILLIAM L. RANSOM Former President of the American Bar Association	
The American Bar Association in Retrospect	166
JAMES GRAFTON ROGERS, Master of Timothy Dwight College and Professor of Law at Yale University	
Coöperative Effort in the Law	191
HERBERT F. GOODRICH, Vice-President in Charge of the Law School, Professor of Law, and Dean of the Law School at the University of Pennsylvania, and Adviser on Profes- sional Relations, American Law Institute	
The Old Regime and the New in Civil Procedure	207
ROBERT WYNESS MILLAR Professor of Law at Northwestern University	
The Courts and the Dispatch of Judicial Business	274
GEORGE W. WICKERSHAM Late Attorney-General of the United States	
Federal Criminal Law	295
MARTIN CONBOY, Former United States Attorney Southern District of New York	
Jury-Trial Rules of Evidence in the Next Century	347
JOHN H. WIGMORE, Dean Emeritus of the School of Law at Northwestern University	
The Implementing of Arbitration Statutes	370
NATHAN ISAACS Professor of Business Law at Harvard University	
Index for Volume One	381

---

## VOLUME II—*Public Law and Jurisprudence*

---

The Crisis in the Theory of the State	I
HAROLD J. LASKI, Professor of Political Science London School of Economics and Political Science	
The Schechter Case—Landmark, or What?	32
EDWARD S. CORWIN, McCormick Professor of Jurisprudence at Princeton University	
Public Utilities—Progression or Retrogression?	81
WILLIAM M. WHERRY, Member of the New York Bar	
Progress of Local Government, 1836–1936	105
CHARLES W. TOOKE Professor of Law at New York University	
A Century of International Law	144
EDWIN BORCHARD Professor of International Law at Yale University	
The American Science of International Law	166
JOSEF L. KUNZ, Lecturer in International Law at the University of Toledo and Professor at the Academy of International Law at The Hague	
The Century of Analytic Jurisprudence since John Austin	195
ALBERT KOCOUREK Professor of Law at Northwestern University	
The Function of the Pure Theory of Law	231
HANS KELSEN, Professor of International Law at the Graduate Institute of International Studies, Geneva, Switzerland	
Ways of Thinking About Rights: A New Theory of the Relation Between Law and Morals	242
WILLIAM ERNEST HOCKING, Alford Professor of Natural Religion, Moral Philosophy, and Civil Polity at Harvard University	



A Critical Sketch of Legal Philosophy in America	266
MORRIS R. COHEN, Professor of Philosophy at the College of the City of New York	
Has Capitalism Failed in Law?	320
HERMANN KANTOROWICZ, Lecturer in Law and History at the University of Cambridge and at All Souls College, Oxford	
Value in Law and Economics	332
JOHN R. COMMONS Emeritus Professor of Economics at the University of Wisconsin	
Roman Law as the Basis of Comparative Law	346
HESSEL E. YNTEMA Professor of Law at the University of Michigan	
The Rivalry of Common-Law and Civil-Law Ideas in the American Colonies	404
MAX RADIN Professor of Law at the University of California	
Index for Volume Two	433

---

### VOLUME III—*Private Law*

---

The Restatement of the Law of Torts	I
PERCY H. WINFIELD Rouse Ball Professor of English Law, University of Cambridge	
One Hundred Years of Tort Law	34
LEON GREEN, Professor of Law and Dean of the Law School of Northwestern University	
Through Title to Contract and a Bit Beyond	80
KARL N. LLEWELLYN Betts Professor of Jurisprudence at Columbia University	

The Growing Function of Equity in the Development of the Law	139
WILLIAM F. WALSH Professor of Law at New York University	
The Law of Estates since Butler and Kent	199
RUSSELL DENISON NILES Professor of Law at New York University	
American Business Association Law a Hundred Years Ago and Today	254
E. MERRICK DODD, JR. Professor of Law at Harvard University	
The Extension of Admiralty Jurisdiction and the Growth of Substantive Maritime Law in the United States since 1835	294
GEORGE C. SPRAGUE Assistant Professor of Law at New York University	
Conflicts of Laws in the History of the English Law	342
ALEXANDER N. SACK Professor of Law at New York University	
Complete Index	455



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## BIOGRAPHIES OF AUTHORS

### JOSEPH HENRY BEALE

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St. John's College, 1928-1931; visiting professor, Yale University, 1929-1931. Member, executive committee, International Congress of Philosophy, 1926. Fellow, American Association of Arts and Sciences; member, American Association of University Professors (council 1918-1921), American Philosophical Association (president 1929), American Political Science Association; organizer, Conference on Legal and Social Philosophy, 1913. Author of *Reason and Nature; Law and the Social Order*; co-author of *Cambridge History of American Literature* (volume 3); *Contemporary American Philosophy* (volume 1); *An Introduction to Logic and Scientific Method*; editor of *Modern Legal Philosophy Series*; contributor to various periodicals.

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Born 1878. Ph.B., LL.D. University of Michigan; Ph.D. University of Pennsylvania; Litt.D. Harvard University. Instructor in history, Brooklyn Poly-

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## FREDERICK EVAN CRANE

Born 1869. LL.B., LL.D. Columbia University; LL.D. St. Lawrence University, St. John's College, New York University, Union College, Fordham University. Admitted to the bar 1890; practised at Brooklyn, New York, 1890-1896; assistant district attorney, Kings County, 1896; county judge, Kings County, New York, 1901-1906; justice, Supreme Court of New York, Second District, term January 1, 1907-December 31, 1920; appointed judge, Court of Appeals, January 1917, and unanimously elected by all parties to same office, 1920, present term ends 1940, unanimously elected chief judge, 1934.

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## HAROLD J. LASKI

Born 1893. Manchester Grammar School; New College, Oxford (Honorary Exhibitioner). Beit Essay Prize, 1913; First Class Honour School of Modern History, 1914. Lecturer in history, McGill University, 1914-1916, Harvard University, 1916-1920; Henry Ward Beecher lecturer at Amherst College, 1917; Harvard lecturer at Yale University, 1919-1920; connected with London School of Economics since 1920-; lecturer in political science, Magdalene College, Cambridge, 1922-1925; professor of political science, University of London, 1926-; visiting professor, Yale University, 1931; Storrs lecturer, 1933. Vice-chairman of the British Institute of Adult Education, 1921-1930; member, Fabian Society Executive, 1922-1936; Industrial Court, 1926-; Lord Chancellor's Committee on Delegated Legislation, 1929; Departmental Committee on Local Government, 1931; Governmental Committee on Legal Education, 1932; Council of Institute of Public Administration. Author of *The State in Theory and Practice*; *The Rise of European Liberalism*; *The Problem of Sovereignty*; *Authority in the Modern State*; *Political Thought from Locke to Bentham*; *Foundations of Sovereignty*; *Letters of Burke* (editor); *The Defense of Liberty Against Tyrants* (editor); *Autobiography of J. S. Mill* (editor); *A Grammar of Politics*; *Communism*; *Liberty in the Modern State*; *The Dangers of Obedience*; *An Introduction to Politics*; *Studies in Law and Politics*; *The Crisis and the Constitution*; *Democracy in Crisis*; articles in the *New Republic*; *Harvard Law Review*, *The Nation*, *Manchester Guardian*, and other periodicals.

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Born 1893. Realgymnasium, Schwerin, Germany, 1911; A.B., LL.B., J.D. Yale University. Admitted to the Connecticut bar, 1919; practised law in New York City, with firm of Shearman and Sterling, 1920-1922. Instructor in law, Yale University Law School, 1919-1920, assistant professor of law, 1922-1923, associate professor of law, 1923-1925; associate professor of law, Columbia University School of Law, 1925, professor of law, 1927, Betts professor of jurisprudence, 1930-; guest professor, University of Leipzig, 1928, 1931-1932. Member, New York State Commission on Uniform State Laws, 1926-. Author of *Cases and Materials on Sales*; *The Bramble Bush*; *Präjudizienrecht und Rechtsprechung in Amerika*; *Put in His Thumb*; various articles; draftsman, various uniform commercial acts.

## ROBERT WYNESS MILLAR

Born 1876. LL.B., A.M. (Hon.) Northwestern University. Admitted to Illinois bar, 1897; practised with firm of Johnson and Morrill, 1897-1901; in partnership with William H. Johnson, 1901-1910; practised independently, 1910-1915. Instructor in law, John Marshall Law School, 1903-1915; lecturer, Northwestern University School of Law, 1910-1915, professor of law, 1915-. Major, Judge Advocate General's Department, March-October 1918, Lieutenant-Colonel, October 1918-July 1919, Colonel, July-September 1919; member, Board of Review, Military Justice Division, October 1918-September 1919; consultant to Judicial Advisory Council of Cook County, Illinois; secretary for United States, Stair Society (Scotland); member, American, Illinois State, and Chicago Bar Associations, Chicago Law Institute, American Judicature Society (director), American Law Institute, Société de Législation Comparée. Author of *Common Law Pleading*, *Library of American Law and Practice*, volume VII; *The Formative Principles of Civil Procedure*; translator of Garofalo's *Criminology*; translator and editor of Engelmann-Millar, *History of Continental Civil Procedure*.

## RUSSELL DENISON NILES

Born 1902. A.B., LL.B. University of Montana; J.S.D. Yale University. Instructor in English language, University of Colorado, 1925-1927, assistant professor, 1927-1929; assistant professor of law, New York University, 1929-1931, professor, 1931-.

## ROSCOE POUND

Born 1870. A.B., A.M., Ph.D. University of Nebraska; LL.M. (Hon.) Northwestern University; LL.D. Universities of Michigan, Nebraska, Missouri, Chicago, Cambridge, Pittsburgh, Colorado, California, and Cincinnati; Brown, Harvard, and George Washington Universities, and Union College; L.H.D. Boston University; J.U.D. University of Berlin. Admitted to the bar, 1890; practised at Lincoln, Nebraska, 1890-1901. Assistant professor of law, University

of Nebraska, 1899-1903, dean of the College of Law, 1903-1907; professor of law, Northwestern University, 1907-1909, University of Chicago, 1909-1910; Story professor of law, Harvard Law School, 1910-1913, Carter professor of jurisprudence, 1913-, dean, 1916-1936, dean emeritus, 1937-. Commissioner of Appeals, Supreme Court of Nebraska, 1901-1903; Nebraska Commissioner on Uniform State Laws, 1904-1907; chairman, Section on Legal Education, American Bar Association; president, Association of American Law Schools, 1911; secretary, Nebraska State Bar Association, 1901-1907; director, American Judicature Society, Survey of Criminal Justice in Cleveland; member, Nebraska Academy of Sciences, American Microscopic Society, *Associé Libre de l'Académie Internationale de Géographie Botanique*, International Academy of Comparative Law, International Institute of Public Law, President Hoover's National Commission on Law Observance and Enforcement, 1929, Botanical Society of America, *Académie Internationale de Droit Comparé*, *Institut International de Droit Public*; fellow, American Academy of Arts and Sciences (president 1935-1936); foreign fellow, Royal Society of Naples; honorary fellow, Royal Academy of Sciences, Letters, and Fine Arts of Palermo. Author of *Readings on the History and System of the Common Law*; *Readings on Roman Law: Cases on Equitable Relief Against Defamation and Injuries to Personality*; *Outline of Lectures on Jurisprudence*; *Outline of a Course on the History and System of the Common Law*; *Readings on the History and System of the Common Law* (3d edition, with T.F.T. Plucknett); *Introduction to the Study of Law*; *The Spirit of the Common Law*; *Introduction to the Philosophy of Law*; *Interpretations of Legal History*; *Law and Morals*; *Criminal Justice in America*; *Ames and Smith's Cases on Torts* (new edition); *Outline of a Course on Legislation*; numerous articles and reviews in legal periodicals.

## MAX RADIN

Born 1880. A.B. College of the City of New York; Ph.D. Columbia University; LL.B. New York University. Admitted to the New York bar, 1902, California bar, 1920; practised in New York City with Bloomberg and Bloomberg, 1902-1904; alone, 1904-1905; with I. Josephson, 1905-1912. Taught in New York high schools, 1901-1919; head of commercial law department, Newton high school, 1909-1919; instructor, Columbia University Extension, 1918-1919; lecturer on Roman and Civil Law, College of the City of New York, 1917-1919; professor of law, University of California, 1919-; Stanford Law School, summer quarter, 1931; Northwestern University Law School, summer quarter 1936. Member, Social Science Research Council of Pacific Coast, American Council Institute of Pacific Relations, Society of Legal History, American Philological Association, *Société d'Histoire du Droit* (Paris), Stair Society (Scotland); American National Committee, International Congress of Comparative Law. Author of *The Legislation of the Greeks and Romans on Corporation*; *Handbook of Roman Law* (Hornbook Series); *The Lawful Pursuit of Gain*;

Handbook of Anglo-American Legal History; articles in American, English, and Continental periodicals on law, history, and philology.

## WILLIAM L. RANSOM

Born 1883. LL.B. Cornell University. Executive secretary to mayor of Jamestown, N. Y., 1901; member, law firm of Ransom and Cawcroft, Jamestown, 1905-1907; chairman, Citizens' Committee on Charter Revision, 1906-1907; associated with William M. Ivins, New York City, 1907-1911; assistant secretary, Public Service Commission, First District, State of New York, 1911-1913; elected in 1913 as Justice of City Court of New York, resigned in 1917; chief counsel, Public Service Commission, First District, 1917-1918; member, firm of Whitman, Ransom, Coulson and Goetz, 1919-. Fusion candidate for district attorney, New York County, 1917. Member, American Bar Association: Committee on Jurisprudence and Law Reform, 1922-1932; general council, 1931-1932; executive committee, 1932-1935; president, 1935-1936; member, Board of Governors and House of Delegates, 1936-1937. Member, Committee on Legal Education and Committee on Uniform State Laws, New York State Bar Association, 1923-1935; member, Council on Foreign Relations, American Society of International Law; Association of the Bar of the City of New York, New York County Lawyers Association, Westchester County Bar Association, Cornell Law Association (president 1924-1927), American Law Institute, New York Law Institute, American Judicature Society, National Municipal League, American Association for Labor Legislation, American Academy of Political and Social Science, American Economic Association, Academy of Political Science (trustee), Canadian Bar Association (honorary), Pilgrims in United States. Delegate of American Bar Association to Canadian Bar Association, 1935; to Harvard Tercentenary, 1936. Contributor to law reviews and economic periodicals.

## WILLIAM RENWICK RIDDELL

Born 1852. Cobourg Collegiate Institute; Victoria University; B.A. (Mathematical and Natural Science Prizeman), B.Sc., LL.B.; L.H.D. (Hon.), Syracuse University; LL.D. Lafayette College, McMaster University, University of Toronto, Northwestern, Rochester, Wesleyan, Boston, and Yale Universities; J.U.D. (Hon.) Trinity College, Hartford; D.C.L. (Hon.) Colby College. Late professor of mathematics, Government Normal School, Ottawa; called to Bar, honours and gold medal, 1883; practised at Cobourg, 1883-1892; Toronto, 1892-1906; Puisne Justice, King's Bench Division, High Court of Justice, Ontario, 1906; Benchers, Law Society of Upper Canada, 1892; Queen's Counsel, 1898; Justice of Appeal, Supreme Court of Ontario, 1923-; special counsel for City of Toronto in Civic Investigation, the Government of Ontario in Gamey Inquiry, etc.; president, Canadian Social Hygiene Council; formerly member, Senate and Board of Regents, Victoria University; formerly member of Senate, University of Toronto; some years Examiner in Roman, Constitutional and International

Law; Dodge lecturer at Yale University; Blumenthal lecturer at Columbia University; honorary member of bar associations of Missouri, New York, Iowa, Illinois, Michigan, Wisconsin, North Dakota, Georgia, Ohio, Maine, Nebraska, Vermont, and American Bar Association; F.B.S. Edinborough; F.R.S. Canada; F.R.H.S.; Fellow, Academy of Medicine, Toronto. Author of *Constitution of Canada in Its History and Practical Working* (Dodge lectures, Yale University); *Old Province Tales*; *Travels of La Rochefoucauld in Canada, 1795*; *First Judge at Detroit and His Court*; *First Law Reporter in Upper Canada and His Reports*; *Magna Carta*; *The Legal Profession in Upper Canada in Early Times*; *The Life of Robert Fleming Gourlay*; *Upper Canada Sketches*; *The Early Courts of the Province*; *Life of Chief Justice William Dummer Powell*; *Life of Lieutenant Governor John Graves Simcoe*; *British Courts in Michigan*; *The Courts of Ontario*; *The Bar of Ontario*; *The Works of Fracastorius on Morbus Gallicus*; *A Philadelphia Lawyer in Canada in 1810*; *Civics*; *The Constitution of Canada in Form and in Fact* (Blumenthal lectures, Columbia University), etc.; and over five hundred articles in *Transactions of the Royal Society of Canada*, *Canadian Historical Society*, and *Ontario Historical Society*, and legal, scientific, and literary journals.

### JAMES GRAFTON ROGERS

Born 1883. A.B., A.M. (Hon.) Yale University; LL.B., LL.D. Denver University; LL.D. Universities of Colorado and Pennsylvania. Member, firm of Rogers, Shafroth and Rogers, Denver, 1911-1919; member, firm of Hodges, Wilson and Rogers, Denver, 1923-1928. Professor of law, University of Denver, 1910-1927, dean, 1927; dean and professor of law, University of Colorado (on leave 1931-1933), 1928-1935; master of Timothy Dwight College and professor of law, Yale University, 1935-. Assistant Attorney General, Colorado, 1909-1910; executive secretary, Denver Liberty Loan Committee, 1918; taught in emergency War School, Fort Logan, 1918, and served as officer, Field Artillery; organizer and president of several Denver civic organizations; Assistant Secretary of State of the United States, 1931-1933; member, Colorado Bar Association (president 1925-1926), American Bar Association (executive committee 1927-1928), Council on Legal Education, 1926-1937 (chairman 1934-1937), National Conference of Bar Association Delegates, 1926-1928 (chairman 1928-1929), National Crime Commission; chairman, Committee on International Law, 1931-1934. Author of *American Bar Leaders* and many legal, historical, and miscellaneous articles and booklets.

### ALEXANDER N. SACK

Born 1890. A.B., J.D. Moscow University; LL.M. Petrograd. Admitted to practice, Moscow, 1911. Assistant professor of law, Petrograd University, 1917-1919, associate professor, 1919-1921; professor of money and banking, School of Commerce, Petrograd, 1918-1920; professor, Institut des Hautes Etudes Inter-



nationales, Université de Paris, 1928; professor, Academy of International Law, The Hague, 1929; visiting professor of law, Northwestern University School of Law, 1930-1932; visiting professor of law, New York University School of Law, 1932-1935, professor of law, 1935-. Member, International Law Association, London; Society of Comparative Legislation, Paris; American Society of International Law, Washington, D.C.; associate member, New York City Bar Association. Author of treatises on State Succession (two volumes); State Bankruptcies; Land Mortgage Credit, etc.; articles in legal and other periodicals in the United States, France, Germany, etc.

## WALTER SIMONS

Born 1861. Studied at the Universities of Strassburg, Leipzig, and Bonn, 1879-1882; doctor of law (Hon.) University of Kiel; doctor of political science (Hon.) University of Bonn; D.D. (Hon.) University of Marburg; LL.D. Columbia University. Passed examinations for bench and bar at Colmar, 1882, and Berlin, 1888. Judge in different places of Rhineland and Thuringia, 1890-1905; member of the High Court of Appeal of Kiel, 1905; Councillor at the Reichsjustizamt at Berlin (Ministry of Justice), 1905-1911; judicial adviser of the Foreign Office of Germany, 1911-1918; special adviser of the Chancellor Prince Max of Baden on questions of international law, fall 1918; director of the Judicial Department of the Foreign Office, spring 1919; partook at the preparation of the Second Peace Conference, 1907, and the London Naval Conference, 1908-1909; German Delegate to the Universal Conferences on bills of exchange at The Hague in 1910 and 1912 (General Reporter with M. Lyon-Caen) and at the Oslo Conference on the Neutralization of Spitsbergen, 1914. Commissioner General of the German Peace Delegation at Versailles, April-June 1919, under Count Brockdorff-Rantzau; resigned when it was certain the Peace would be signed by Germany, June 20, 1919. Acting president of the Imperial Union of German Industries (Reichsverband der Deutschen Industrie) 1919-1920. Minister of Foreign Affairs, 1920-1921; leading member of the German Delegations to the Conferences of Spa, July 1920, and London, March 1921; resigned another time after the London ultimatum of May 1921. President of the Judicial Committee in the negotiations between Germany and Poland about the division of Upper Silesia at Beuthen and Geneva, February-May 1922; Chief Justice (President of the Supreme Court of Germany at Leipzig), 1922-1929; president ad interim of the German Reich between the death of Ebert, March 1925, and the election of Hindenburg, May 1925; as Chief Justice resigned in 1929 from the German Supreme Court. Membre de l'Institut de Droit International (Brussels); member and vice-president of the International Law Association, member of its Executive Council (London); honorary president of the German Society for International Law (Berlin); member of the Academy for German Law, and its Committee on International Public Law (Berlin); Senator of the German Academy (Munich); member of the Kaiser-Wilhelm Society for Promoting the

Sciences, and of its Committees on International Public and Private Law; member of the Ecumenical Council on Life and Work (Stockholm); member of the Alliance for Promoting International Friendship through the Churches, and its Executive Council; honorary president of the Evangelical-Social Congress of Germany, and of the New German Bach-Society, etc. Author of Judgments of the Constitutional Court of Germany and of the Imperial Disciplinary Court of Germany; Religion and Law (lectures before the University of Uppsala), Swedish 1934, German 1936; many articles in German and foreign periodicals on various matters.

### GEORGE CLARE SPRAGUE

Born 1884. A.B., LL.D. Olivet College; Ph.D., LL.B. New York University. Admitted to practice in New York, 1912; practised with Hunt, Hill and Betts, 1914-1934, Crawford and Sprague, 1934-. Taught in Prospect Heights School, Brooklyn, New York, 1905-1908; registrar, New York University, 1908-1915; instructor in law, 1911-1917, assistant professor of law, 1917-; special lecturer on admiralty law, Columbia Law School, 1929. Member, American Bar Association, Association of the Bar of the City of New York, International Law Association, Maritime Law Association, Japan Society. Co-author, Lord and Sprague's Cases on Admiralty.

### CHARLES W. TOOKE

Born 1870. A.B., A.M., D.C.L. Syracuse; LL.B. Illinois. In practice, 1902-1922. Fellow in administrative law, Columbia University, 1894-1895; professor of public law and administration, University of Illinois, 1895-1902; professor of law, Georgetown University Law School, 1921-1927; professor of law, New York University 1927-. Author of Cases on Municipal Corporations, and of articles in various legal periodicals.

### ARTHUR T. VANDERBILT

Born 1888. A.B., A.M. Wesleyan University; LL.B. Columbia University. Admitted to practice in New Jersey, 1913; practised in Newark, N. J., 1913-. Taught in Central Evening High School, Newark, 1910-1914; professor of law, New York University, 1914-. Counsel, Essex County, N. J., 1921-; chairman, Judicial Council, N. J., 1930-; Insurance Law Section, American Bar Association, 1933-1934; National Conference of Judicial Councils, 1933-; member, American Bar Association, Executive Committee and Board of Governors of American Bar Association, 1934-1937, New Jersey State Bar Association, Essex County Bar Association, American Political Science Association. Nominated for president, American Bar Association, 1937.

### WILLIAM F. WALSH

Born 1875. A.B., LL.D. Williams College; LL.B., J.D. New York University. Admitted to practice in New York, 1900; practised with Kenneson, Crain, Emley

and Rubino, New York City, 1901-1902; as Van Zandt, Walsh and Webb, Brooklyn, New York, 1901-1903; private practice, 1903-1917. Taught in New York University School of Commerce, 1901-1902; instructor in law, New York University, 1902-1905, professor of law, 1905-. Author of texts on Property (1st and 2d editions); Equity; History of Anglo-American Law (1st and 2d editions); Future Estates in New York; Mortgages; Cases on Property (1st, 2d, and 3d editions); Cases on Mortgages; articles in various law reviews.

### WILLIAM MACKEY WHERRY

Born 1878. B.S. University of Michigan. Admitted to the New York bar, 1900; began practice in New York City, 1900; member, firm of Wherry, Condon and Forsyth. Active worker with Council of National Defense and Food Administration (New Jersey, World War); ex-president, Charity Organization Society, Plainfield, N. J. Member, American Bar Association, New York State Bar Association, New York County Lawyers Association (chairman, committee on aeronautical law), Bar Association of the City of New York. Author of *Libel Law of New York*; *Public Utilities and the Law*; *Study of the Organization of Litigation in New York Supreme Court, New York County*; *New York University School of Law Monograph Series No. 1* (1931); articles in legal periodicals.

### GEORGE WOODWARD WICKERSHAM

Born 1858; died 1936. LL.B., A.M. (Hon.) University of Pennsylvania; LL.D. Lehigh and Harvard Universities, Hobart, University of Michigan; D.C.L. Syracuse. Admitted to Pennsylvania bar, 1880; New York bar, 1883; practised at Philadelphia, 1880-1882; member, firm of Strong and Cadwalader, 1887-1909; Attorney General of United States in Cabinet of President Taft, 1909-1913; member, firm of Cadwalader, Wickersham and Taft, 1914-1936. Delegate at large, New York Constitutional Convention and chairman, committee on judiciary, 1915; member and vice-chairman, District Board of the City of New York under Selective Service Law, September 1917-August 1918; special commissioner, War Trade Board to Cuba, August-September 1918; member, President Wilson's Second Industrial Conference, 1919; member, Committee on Progressive Codification of International Law, appointed by Council of League of Nations, 1924-1929; president of International Arbitral Tribunal under the Young Plan treaties since 1932; member, Commission on Reorganization, New York State Government, 1925-1926; appointed chairman, National Commission on Law Observance and Law Enforcement, by President Hoover, 1929. Trustee, University of Pennsylvania, 1920-1926; trustee, Barnard College (Columbia), Carnegie Institution, Washington, Cathedral of St. John the Divine. Former chairman, Committee on International Justice and Good Will of Federal Council of Churches of Christ in America. Member, American and New York State bar associations, Association of the Bar of the City of New York (president 1914-1917), American Law Institute (president 1923-1936), Ameri-

can Prison Association (president 1920), France America Society, American Society, French Legion of Honor (president 1926-1932). Decorated Officer and Commander, Légion d'Honneur (French). Author of *Changing Order* (essays and addresses); *Spring in Morocco*; series of letters in New York *Sun*, explaining proposed changes in the Constitution of New York State; articles in *The Covenanter*, written in collaboration with ex-President Taft and others; frequent contributor to magazines.

## JOHN HENRY WIGMORE

Born 1863. A.B., A.M., LL.B. Harvard University; LL.D. Harvard, Wisconsin, and Louvain Universities. Practised in Boston with Champlin, Ryther and Wentworth, 1887-1888; Seth P. Smith, 1888; W. V. Kellen, 1889. Professor of Anglo-American law, Keio University, Japan, 1889-1892; professor of law, Northwestern University, 1893-1934 (retired), dean of the Law School, 1901-1929, adviser and lecturer on public and professional relations, 1934-. Illinois Commissioner on Uniform State Laws, 1908-1925, 1933-. Member, American Bar Association, Illinois State Bar Association, Chicago Bar Association, United States Section, Inter-American High Commission, 1915-1919, Air Law Institute, Council of Selden Society (England), International Academy of Comparative Law, League of Nations Committee on Intellectual Cooperation; legal adviser, United States Bureau of Air Commerce, 1936-, honorary member, Society of Teachers of Law (England), 1918, Asiatic Society of Japan, 1911, Belgian Royal Academy (1935); corresponding member, Comité de Législation Etrangère (France); president, American Institute of Criminal Law and Criminology, 1909-1910, American Association of University Professors, 1916; Chevalier, Legion of Honor (France), Order of Sacred Treasure (Japan). Author of *Australian Ballot System*; *Private Law in Old Japan*; *Treatise on Law of Evidence*; *Pocket Code of Evidence*; *Students' Text-Book of Evidence*; *Casebooks on Evidence*, *Torts*, *Military Law*; *Problems of Law, Past, Present and Future*; *Panorama of the World's Legal Systems*; *Principles of Judicial Proof*; numerous articles in periodicals.

## PERCY HENRY WINFIELD

Born 1878. F.B.A., LL.D., B.A.; J.P.; LL.D. Harvard; F. R. Hist. Soc.; Barrister, Inner Temple; Rouse Ball professor of English Law, Cambridge, 1928-; Fellow of St. John's College, Cambridge; formerly Deputy County Court Judge, Circuit No. 35. King Edward VII School, King's Lynn; St. John's College, Cambridge. Senior in both parts of Law Tripos; Whewell Scholar in International Law; McMahon Law Student; practised on South-East Circuit, 1902-1905; Lieutenant in Cambridgeshire Regiment, 1915-1919; wounded in action near Morlancourt, August 1918; attached to staff at War Office, 1919; President of Society of Public Teachers of Law, 1929-1930; Law lecturer, St. John's College, 1918-1928, and at Trinity College, Cambridge, 1918-1926; University

lecturer in Law, Cambridge, 1926-1928; Tagore Law Professor, Calcutta University, 1930; Chairman of Law Tripos Examiners, 1922; lecturer on English Legal History in Law School of Harvard University, 1923; Examiner to Council of Legal Education and to Law Society; member of Council of Senate, Cambridge University, 1924-1932. Author of *History of Abuse of Legal Procedure*; *Present Law of Abuse of Legal Procedure*; *Wise and Winfield, Outlines of Jurisprudence*; 1923 edition of *Lawrence's International Law*; *Chief Sources of English Legal History*; *Salmond and Winfield, Law of Contracts*; *Province of the Law of Tort*; *Text-book of Law of Tort*; joint editor of *Cambridge Legal Essays*; editor-in-chief of *Cambridge Law Journal*; editor, *Law Quarterly Review*, 1929; numerous contributions to law magazines and other periodicals.

### HELSEL EDWARD YNTEMA

Born 1891. A.B., A.M. Hope College; A.M., Ph.D. University of Michigan; B.A. (Juris) Oxford University; S.J.D. Harvard University. Instructor in political science, University of Michigan, 1917-1920; lecturer in Roman law and comparative jurisprudence, Columbia University, 1921-1922, assistant professor, 1922-1924, associate professor, 1924-1928; professor of law, Johns Hopkins University, 1928-1933; visiting professor of law, University of Michigan, 1933-1934, professor of law, 1934-. Author of various articles in law reviews.

VOLUME ONE

*History, Administration, and Procedure*



## A CENTURY OF NEW YORK UNIVERSITY SCHOOL OF LAW

FREDERICK E. CRANE

ON the Albany Post Road, just north of Poughkeepsie, there are preserved a few of the milestones that marked distance in the stagecoach days. These milestones are preserved as curiosities, relics of bygone times, and yet less than a hundred years have gone by since they were of practical use. So fast are we traveling today that we mark distances by other instruments.

The law has its milestones or means by which we reckon its progress, and, although with the multiplicity of laws and the plethora of decisions we seem to be pushing on at a terrific pace, it is well to give some attention and notice to these markings which indicate the distance we have traveled. This has been done this year in the hundredth anniversary celebration of the New York University Law School. The occasion has been something more than a glorification of the success of the University, or of the present magnitude of the Law School and its work, or an optimistic and hopeful prophecy for the future. The contributions to these volumes have looked backward as well as forward, and justified the belief that man, in his relation to man and to government, has been making true progress in spite of the doubts that seem to exist in many minds.

Before the World War of 1914 none of us doubted the theory or fact of evolution. Man was on the rise physically, intellectually, morally; he was progressing as an individual to a much higher state. The duel had passed with the century, and we recalled the Hamilton-Burr episode of 1804 as an example of the twisted mentality of the period that thought the killing of a man



deliberately and in cold blood was an act of honor. We had progressed, in our own estimation, so far as to believe that we had abolished war and that reason had supplanted force. The war shook our faith in ourselves considerably. Then came, however, the World Court and the League of Nations, with the distinct understanding and belief that nations would hereafter be summoned before tribunals for the settlement of disputes, the same as individuals.

Now again we apparently are in chaos. Are we going back, and how far back are we going in abolishing the judicial idea and recurring to that of violence; in again enthroning might above right? No one can answer these questions, and we are too near to events to judge what really is taking place. When, however, we look back over the period of a hundred years to the advance which man really has made in using reason instead of force in settling disputes, and in the effective way in which he has brought about reforms in the laws and the establishment of jurisprudence, we take a firmer grip upon ourselves, pursue our days in quiet and in confidence, finding in the past development of the law reason for the hope and faith that is in us for the future. The idea of a world court and of some kind of agreement among nations for the settlement of all questions by the judicial process has come to stay, although its growth may be slow or retarded.

President Conant, when I was at Harvard this summer, told me that there had been as many presidents of Harvard during the colonial days as there were presidents during the years we have existed as a nation. During those colonial days here in New York courts functioned; there were judges deciding questions involving the rights of citizens, of the colony, and of the king. And yet Chancellor Kent tells us that when he went upon the bench in 1794 and 1800 there were no published reports of any court

decisions. Kent on the bench, Hamilton at the bar, and other lawyers and judges during the next few decades had to work out the principles of law as best they could from such English decisions as they could procure, and from some old treatises. Blackstone, a few years before, had published his *Commentaries on the Laws of England*; Kent was soon to give us his *Commentaries on American Law*, law lectures delivered to a few students at Columbia College. In the course of the years, with the better organization of the courts, came the reporting of the decisions, and the discussions and criticisms of those decisions, by the law-school professors and scholars. Thus has developed our system of jurisprudence, with the continual additions of legislation. The work has gone on, as we all know, at a tremendous pace, until in New York City alone there are now over ten thousand students of the law.

The law school, such as that of New York University, not only has become a very important part of the preparation of lawyers for the practice of their profession; it has sent out its influence in many other directions. With the vast number of decisions coming down from the courts of the states and of the United States we now look to the professor and teacher of law for that analysis of the cases which finds in them the unifying principle and the steady rule for daily application. In the publications of the law magazines of the various institutions, we are furnished, both the bench and the bar, with helpful aids to the solution of knotty problems and with the study and development of new principles, or else new applications of old rules. The judges, as I know—even if they are not willing to confess it—look more and more to the professors of our law schools for guidance and help in their decisions. We have an unwritten rule in most of the courts, especially in the United States Supreme Court and the Court of Appeals, that textbooks and law magazines shall not be cited in

opinions. We frequently depart from this unwritten rule through mere shame of using the material which the research of a law professor has given to us without due acknowledgment to him.

The law school, therefore, not only has arrived at the point, through a process of evolution, where it teaches the law and prepares the students for the bar examination, but its close association with the university gives to the practice of the law the impress of a cultural life. The law is still a profession, and a law school, like this of New York University, impresses upon its students the ethics as well as the ideals of the great lawyer.

Beyond the teaching of the law, as I have said, the law school has become, through its publications and the work of its professors, a guide and a help for the adult practitioner and the judges on the bench. Not satisfied with this, we have seen in the last decade a further advance. The law school, in the process of events, is now placing much emphasis upon the relation of the lawyer and of the courts to government as a whole and to economic and social conditions which may be reached and improved by the proper administration of law. Into this field the professor and scholar today are throwing themselves with much energy and patriotism. We find them called upon as experts by the national, state, and municipal governments. The City of New York at the present time has as its advisers in many of its departments some of the finest young men out of our law schools. It is indeed a new era when the effort is made to obtain the best trained minds for the solution of governmental problems instead of resorting continually to the political hack.

At the beginning of this article I spoke of the milestone as indicating distance. How can we measure, and by what standard shall we measure, the civilization of a nation or a people at any particular period? Must it not be according to the laws that existed and the manner in which they were administered? We

cannot determine the condition of a nation by its poets, musicians, artists, or even its scientists. Shakespeare, Milton, and Samuel Johnson are no standards for the civilization of their day. When we turn to its laws, see how people were treated by the government and by the courts, see how the poor, the sick, and the unfortunate were cared for, we begin to realize how near the nation as a nation had come to the teachings of religion and philosophy. By the laws and the courts we can form a fairly good estimate of the place that a nation should occupy in history.

When we pause, as we do at this one hundredth anniversary, to look back in some such sketchy fashion as I have here given, we are, I am sure, amazed at the universal interest shown in the administration of law, and at the determination of intelligent men to make it serve the purpose of doing justice to all people, irrespective of race, creed, or condition. This interest and this purpose have been fostered and stimulated by our universities and the men who have devoted their lives to teaching.

We owe a great debt of gratitude to New York University for the progress that it has made, the work that it has done, the devotion of a distinguished and faithful faculty to the great cause of justice, and the courage that has animated them all. There has never been any faltering, any doubt, any weakness, but a sure and steady advance in the belief that, through the learning and intelligence of a consecrated profession, justice—the hope of the world—shall be brought to all peoples and to all nations by the proper administration of wise laws and by the new and efficient application of old principles.

## PREFATORY NOTE

FRANK H. SOMMER

THE publication of these volumes ends the activities which marked the celebration of the passing of one hundred years since the founding of the School of Law of New York University. The role of penning a prologue to the pageant, which the volumes present, of the progress of the law through the century is assigned to me. Left to my own judgment I would give the signal for drawing aside the curtains behind which teachers of law and members of bench and bar of our own and other lands—author-players in the pageant—stand ready to play their several parts, and step aside. The eminence of the author-players carries assurance that no prologue is needed to prepare the way for, or to clarify, what is to come. A prologue runs the risk of stirring the audience to clamorous cries of “On with the pageant.”

However, I am told that convention demands a prologue—a prefatory note. I accede to the request for fear that to some in the audience departure from convention may be disturbing. By adhering to convention at the outset I may soften the shock of the nonconventional approaches and nontraditional thinking that mark some of the author-players’ lines. It goes without saying that the production is uncensored, for academic freedom is the unbroken tradition of the producing institution.

The program of the pageant—table of contents—indicates that the author-players’ group is cosmopolitan in its make-up. All schools of legal thought are represented—historical, analytical, sociological, behavioristic, and realistic. Those who resent being classified as members of any school are not unrepresented. A preview of the pageant makes clear that the author-players have not

worked in a spirit of mere antiquarian interest; that they have avoided the danger of making the role of history more important than it is; that they have labored in the spirit of the day, consciously weighing the worth, and questioning the grounds of legal doctrines and rules, and that they have given due recognition to the fact that, as I. Maurice Wormser once aptly put it, "the law is *a part of life* and not *apart from life*"; and that they have made facts live.

The pageant as a whole demonstrates that the law has grown and is growing; that it has been restated from generation to generation to accord with the *mores* of the day, and that in this work of restatement the judges have played a part as well as legislators.

To each of the author-players goes the gratitude of the Dean and members of the Faculty for generous coöperation.

To Professor Alison Reppy whose persuasive pen and voice brought the group of author-players together and held them through the trying days of rehearsal goes appreciation in unstinted measure.

To the Supervisor and Staff of the University Printing Office, who designed the scenic effects and costumes of the pageant—the format of the volumes—and who directed its production goes a full measure of appreciation, gratitude, and praise.

The curtains are drawn; the prologue has been read. On with the pageant!

# A HUNDRED YEARS OF AMERICAN LAW

ROSCOE POUND

IT IS said that in one of our states two generations ago a statute was regularly enacted in this language: "Be it enacted that it shall be unlawful for any person or persons to discharge any loaded fire arm or fire arms in, along or upon any public road or highway in this state except for the purpose of killing some noxious or dangerous animal or an officer in the pursuit of his duty." Certainly that was a law. No less certainly as it stood and read it was not law. On the contrary, a resort to law was needed to make law out of it. For law is more than an aggregate of laws. Laws, in a sense, are but raw materials of law. It is law which gives them life. Law makes laws effective for their purpose as instruments of justice. It develops them to meet situations which the lawmaker forgot or did not appreciate. It limits them to their reason and spirit when the lawmaker fails to pursue his end with exactness. It supplies gaps in the legislator's scheme when he fails to pursue his end with completeness. When we speak of law, therefore, we speak of something more significant and more enduring than laws.

Using law in the foregoing sense, thinking of it as much more than an aggregate of laws, it is no less true that there is no law without lawyers. Law, as we know it in developed political societies, begins with lawyers. It begins when the tradition of conduct of transactions, decision of causes, and advising parties to controversies becomes secularized and passes into the hands of a specialized profession. At Rome a turning point is reached when the traditional formulae of actions are divulged and when, somewhat later, the first plebeian *pontifex maximus* begins to give consultations in public so that students may attend and take notes.

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Modern law has its beginnings when Roman law became the rival of the law of the church and presently set itself free from clerical control. In English legal history, the supremacy of the King's courts, which gave us the common law, may well be dated from the constitutions of Clarendon, which put definite and narrow limits to the jurisdiction of the ecclesiastical courts. Likewise, in colonial America, especially in New England, the history of law begins when the administration of justice begins to come into the hands of professional lawyers, after a regime of magisterial and legislative justice carried on chiefly by means of clerical and military magistrates. Justice according to law is justice administered by lawyer judges aided by lawyer advocates.

In the English-speaking world one must insist particularly upon the relation of lawyer judges to the law. For the common law, the law of the English-speaking world, is a law of judges, not of teachers or writers. Its form is recorded judicial experience. Its oracles are judges. Its great names are the names of judges, not of teachers. Its technique is a lawyer's technique of finding the grounds of decision in past decisions, not a teacher's technique of finding them in academic commentaries or written texts.

Thus we cannot profitably consider law apart from lawyers, nor Anglo-American law apart from judges. To understand American law of one hundred years ago, we must take account also of American lawyers and American courts and judges as they were in 1835.

By 1835 the movement to deprofessionalize the lawyers, the bad effects of which are so manifest today, had acquired a momentum which was to keep it active almost to the close of the century. Development of a legal profession was well begun at the time of the Revolution. After the Revolution a reaction set in which in time undid what had been achieved in the latter part of the eighteenth century and carried us for a hundred years in a



direction quite opposite to that in which we had started. In the last third of the eighteenth century the prejudice against lawyers, which had been strong in the earlier days of the Colonies, had largely worn away. Twenty-five of the fifty-six signers of the Declaration of Independence were lawyers. Thirty-one of the fifty-five members of the Constitutional Convention were lawyers, and five of them had studied law in England. But these men represented almost entirely the generation which had come to the bar under the Colonial regime. Unhappily, a large number of the older and stronger lawyers were Royalists and left the country or ceased to practise. Thus one result of the Revolution was to leave the practice of law chiefly in the hands of lawyers of a lower type and of less ability and education. Except in a few centers of legal culture, the greater number of lawyers had come from the Revolutionary armies with many bitter feelings and but scanty knowledge of the law. Alexander Hamilton's preparation for the bar was three months' reading. His less gifted contemporaries, who came before the courts with the same hasty preparation, were neither prepared nor disposed to keep up the traditions of the common-law bar.

After the Revolution, a deep and widespread depression set in. Business had been wholly deranged by the war. The ports had been closed and the British navigation laws and prohibitory duties cut off trade with the West Indies, which had been a source of wealth. Enormous public debts required ruinous taxation. Those who had property were property poor. Those who had engaged in enterprise were weighed down by debts. The federal government was heavily in debt to the soldiers and its paper money was worthless. The Tories were reclaiming property under the terms of the treaty of peace, and British creditors were suing upon debts due them but supposedly cut off by confiscatory legislation. The chief law business was collection of debts and the

majority of the lawyers were debt collectors—never the highest type of the profession. Moreover, those were the days of imprisonment for debt and strict foreclosure. All the claims and debts which had accumulated and been held up during the war were being sued on. Lawyers were relatively few and had a monopoly of business in the courts. Hence, while every one else was idle they were busy, and, as they would do nothing without a retainer, they alone were making money. Every young man sought to become a lawyer.

Public feeling against lawyers became strong and the legislative steam roller was called into action. As usually happens, in its destructive course it levelled the good and the bad alike. Much of the best that had been achieved in the eighteenth century was lost, and little, if anything, that was good was put in its place. For a generation law and lawyers labored under the ill effects of this depression.

Political conditions after the Revolution had an equally bad influence. The lawyers were generally conservatives and many of the best lawyers had been Royalists. In consequence, all lawyers were the objects of demagogical attacks, and there was much mischievous legislation throwing the profession open to every one without regard to education, training, or even character.

Social conditions played their part also. The idea of a profession was repugnant to the Jeffersonian era. The feeling was strong that all callings should be on the same footing, and that the footing of a business—of a money-making calling. To dignify one calling by holding it a profession, and to prescribe qualifications for and limit access to it, seemed undemocratic and un-American. In the newer pioneer states this feeling was reinforced by pioneer distrust of specialists and faith in versatility. Thus false ideas of democracy led to general rejection of the common-law idea of an organized, responsible, self-governing profession.

Geographical conditions and conditions of travel called for decentralization and a system of local courts, each with its local bar. Characteristically, there was no thought of coöperation among these separate units and they came to have little more than a nominal organization. By 1835 the policies as to professional organization, training for and admission to the profession, and professional discipline, which were to obtain till near the close of the century, were definitely established.

Bench as well as bar was affected by the economic depression after the Revolution and the democratic upheaval at the beginning of the nineteenth century. In New York, ultimate appellate jurisdiction was in the Senate until 1847. In New Jersey, laymen were specially appointed to sit on the ultimate appellate tribunal. In Pennsylvania, lay judges sat with lawyer judges. In New Hampshire, after independence, of the three judges of the Superior Court, one was a theologian and another a physician. The chief justice of Rhode Island from 1819 to 1826 was a farmer, and a blacksmith sat in that court from 1814 to 1818. But the common-law tradition was strong and tenacious and able lawyers were put upon the bench, even after the idea of an elective judiciary swept over the land in the middle of the century. Moreover, the policies as to admission to the profession, if they increasingly let in the ill trained and unqualified, at least did not exclude the well trained and well qualified. The tradition of diligent reading under intelligent guidance persisted. A long succession of lawyers of great ability practised before judges who will always be the glory of our judicial history. The worst effects of the decentralized, de-professionalized calling and politics-ridden judiciary were not felt till the rise of great cities in the last third of the nineteenth century.

As the bench stood a century ago, James Kent had been retired for a decade, but Reuben Hyde Walworth was chancellor of New

York, and Samuel Nelson, Greene C. Bronson, and Esek Cowen sat in the Supreme Court of New York. At Washington, John Marshall was chief justice of the United States and Joseph Story sat beside him. In the state courts, Shaw was chief justice of Massachusetts, Gibson was chief justice of Pennsylvania, Ruffin was chief justice of North Carolina. François-Xavier Martin was on the bench in Louisiana. Isaac Blackford was on the bench in Indiana. Luther Martin, William Pinkney, and William Wirt had passed on. But Jeremiah Mason, Daniel Webster, Rufus Choate, and Reverdy Johnson were at the bar, and many of those who were to lead after the Civil War were coming forward.

As to legal education, the Litchfield Law School had just come to an end. It had carried over the apprentice training to a type of teaching which was to prevail till near the end of the century. In the fifty years of its existence it had turned out a thousand practitioners, going to all parts of the land, and had done much to keep alive the sound tradition of the bar of the eve of the Revolution. But a new type of school had sprung up. Story had been for six years at the head of Harvard Law School, had written his *Commentaries on Bailments*, his *Commentaries on the Conflict of Laws*, his *Commentaries on the Constitution of the United States*, and his *Commentaries on Equity Jurisprudence* was to appear within a year. The school of Greenleaf and Parsons and Washburn was definitely established. Kent's teaching at Columbia had ended a decade before. But the last volume of his *Commentaries on American Law*, the fruit of that teaching, was but five years old, and the school in which Dwight was to teach had been established. The Yale University School of Law had been established for a decade. The University of Virginia had carried on for very nearly a decade a law school in which the tradition of Wythe and Tucker was handed down; from which, too, was to come the teaching of Minor. Timothy Walker, a pupil of Story,

had set up a law school at Cincinnati, destined to become a factor in the legal development of the West.

As to the form of the law, this was the time of great reporters, in which lawyer reporters spent as much time and care upon reporting a case as the judges did in deciding it. A succession of skilled individual reporters had grown up and had fixed a form of report which even the perfunctory official reporting of a later time has not wholly debased. Alongside judicial development, a legislative reform movement was going on, which was to rid us of many archaisms and give us many distinctively American legal institutions. The "rain of law," which is rather a rain of laws, had not yet begun.

What is of most significance, the reception of the common law as the basis of American law had been definitely achieved. Political conditions after independence had brought about a general distrust of English law, which was prolonged by the rise of Jeffersonian democracy at the beginning of the nineteenth century. France had adopted a civil code in 1804. A large and influential party was enthusiastically attached to France and all things French. In the second decade of the century we were at war with Great Britain for a second time. It was not easy for the common law to escape the odium of its English origin. There was much agitation among the laity for an American code, to be drawn up by an exercise of pure reason, without regard to the common law or to the law of the past. But by the middle of the fourth decade of the century, the common law had prevailed and American law had entered upon the era of maturity which was to characterize the last century. Equity had been crystallized through the work of Eldon and Kent and Story. The law merchant had been absorbed and worked into our law, again chiefly by Kent and Story. The restatement of the common law, as the law of the new world, by a succession of text writers without precedent in English law

had set in, and once more through the labors of the same Kent and Story. The distinctive type of American law school, the academic-professional school, differing both from the English and from the Continental type, had arisen. We may say fairly that the classical period of American law was at or near its meridian.

In the hundred years following, the story of the American lawyer falls conveniently into two periods, one from 1835 to 1900, the other from 1900 to the present.

By 1835, the older organizations, which had grown up before the Revolution or had been modeled on colonial lines, were generally decayed or gone. Such organizations as there were for a long time thereafter were social in character, meeting for a reunion once a year, with sometimes an address by some well-known lawyer, and sometimes passing resolutions on the occasion of some grave scandal or on matters of more than usual professional interest. They were local associations and were apt to be more or less dormant, with occasional temporary periods of activity. On the whole, our present system of state bar associations and the growing system of incorporated state bars have followed and grown out of the activities of the American Bar Association, organized in 1878. The real growth of the associations, both in number and in influence, has been in the present century. Their useful achievements in promoting uniform state laws, in improving the conditions of admission to the bar, in codifying professional ethics, and in making professional discipline effective have come since 1900.

Perhaps the year 1890 may be put as the nadir of standards of admission and control. By that time centralized admission existed only in sixteen of forty-nine jurisdictions, and in these it was little more than theoretical. In at least half of the sixteen, admission was decentralized in actual administration, and in at least half of the remainder the highest court had abdicated its function

by voluntarily delegating its control over admission to local bar associations, or local courts, or local committees.

A movement for a better system of admission to the profession began to gain in strength after 1890. At that time, in a majority of jurisdictions, admission to the profession might be made through any of a number of local courts; and the court with the lowest standard in effect set the level for the whole jurisdiction. This system, the product largely of pioneer conditions, sacrificed every other consideration to a desire to make the admitting machinery convenient of access to applicants. Where other systems had survived in the books, they had decayed in practice so that in effect admission was a local matter and those who could not pass such local examination as there was could usually find a complacent local court or committee somewhere else. Legislation commonly provided that a person admitted anywhere could claim admission elsewhere on his certificate. It frequently imperatively dictated low standards. In some states it prohibited requirements of general education. Sometimes it went so far as to admit a particular person by a special act, and not infrequently it set aside judicial disbarment of particular persons for gross misconduct and directed their reinstatement. It is only in the present century that the courts have resisted this sort of legislative usurpation of authority.

By 1835 the characteristic American organization of courts had taken permanent form. The problem of the formative era was to adapt the English system to the needs of a country of magnificent distances in a time of slow and expensive travel. It seemed needful to bring justice to every man's back door by means of local courts subject to review by a central but sometimes peripatetic ultimate tribunal.

In the rural, agricultural America of the last century the system worked well. But the independent local tribunals, set up orig-

inally on the presupposition of a substantial equality of business in each, came to involve waste of judicial power in a time of concentration of business in metropolitan centers. Also the tradition of noncoöperation, strong in pioneer America, made the system of headless collegiate tribunals, on the plan of Artemus Ward's military company (in which every man was an officer and the superior of every other), ineffective under the burden of crowded dockets. Here, too, a change has been going forward steadily since 1900. There has been a rapid growth of administrative tribunals of every sort. There has been a slow but steady progress toward unification of the judicial system and toward provision of responsible heads, both of the system as a whole and of each court. The setting up of judicial councils, the committing of wide rule-making power to the courts, the device of appellate divisions where once we set up separate appellate courts are matters of the present century, or at most of the last decade of the nineteenth century, in response to conditions that have made the organization of courts and of judicial administration quite as acute problems as they were in the formative era after the Revolution.

Turning to the law itself, we may recognize three periods: a creative period down to the Civil War, a period of systematizing from the Civil War to the end of the century, and a period of reshaping, destined to be a new creative era, since 1900.

In the creative period, which was at its height one hundred years ago, American courts had, for their task, to develop equity and take over the law merchant parallel with the like work of the English courts. In addition, our courts had to test the traditional English materials at every point with respect to their applicability to the new world. All this was done and was done thoroughly in about three quarters of a century. Along with this work of the judiciary went legislative reform of procedure, beginning in New York in 1847, of criminal law, of the law of descent,



of divorce, and of probate and administration. Until the workmen's compensation laws in the present century, there were no legislative achievements in the domain of law to compare with these statutes of our classical era. Nothing in our law is likely to prove more enduring than this constructive judicial finding and legislative making in that period.

After the Civil War we are in a period of organizing and systematizing rather than of creative legal activity. The faith in creative activity, which was part of the creed of the eighteenth century and prevailed for over a generation in America after it had come to an end in Europe, died out in the established agricultural commercial society of the last third of the nineteenth century. A historical school of jurists arose to take the place of the philosophical jurisprudence of Kent and Story and their successors. Men came to expect the law to grow gradually and spontaneously through some inherent power. Judges and lawyers came to distrust the legislature as an agency of lawmaking. The achievements of the time were in the logical development of details and in putting order and system into the several departments of the law. Law schools came to supersede law offices in training for the bar. Academic teaching gradually supplanted the apprentice system which had obtained in England at and since the time of colonization and is only just giving way in the old home of our law. Juristic activity in the schools became analytical and historical and in the books turned to dogmatic exposition and tended to become little more than a process of digesting and arranging the reported decisions. As the time before the Civil War was one of legislative leadership, the time from the Civil War to 1900 is one of judicial leadership in our polity. Questions of politics came to be thought of as questions of constitutional law. Questions of administration were turned into judicial questions. It was expected that actions at law would

suffice for the regulation of public utilities. It was expected that taxpayers' suits in equity would prevent waste of public funds. It was expected that mandamus would suffice to hold public officers to their duty.

Looking back a generation to the beginning of the present century, the indicia of an era of growth in the law are clear. The courts are reëxamining the authoritative materials of nineteenth-century law with reference to their applicability, much as the courts of a hundred years ago reëxamined the materials of seventeenth- and eighteenth-century English law. The legislatures are doing more than tinker details or enact declaratory laws. The uniform state laws on more than one subject of commercial law have made creative use of the idea of negotiability so as to bring the law into accord with the usages of business. Social legislation, proceeding upon ideas very different from those which underlay the received ideals of nineteenth-century law, has become staple. Creative administration has added a new instrument to the legal armory. Law writers are once more writing texts to rank with the treatises of the classical era. Wigmore's *Treatise on the System of Evidence in Trials at Common Law*, Williston, *The Law of Contracts*, Williston on *Law Governing Sales of Goods at Common Law and Under the Uniform Sales Act*, and Beale's *Treatise on the Conflict of Laws* will make the first half of this century as notable as the writings of Kent and Story and Greenleaf did the first half of the nineteenth. Law teachers are giving over exclusively analytical and exclusively historical methods. Philosophy of law is reviving. Attempts are being made to unify the social sciences, with jurisprudence simply as one of them. Sociological jurists are laying out programs of making the law more effective toward its ends. Realists are applying psychology to the judicial process in order to learn how to make it better achieve its purposes. The bar is once more conscious of itself as

a responsible entity and is seeking and acquiring an organization enabling it to meet its responsibilities. On every side there is a renewal of the faith in the efficacy of effort which characterized our reception of the common law.

Looked at superficially, many features of the legal order of today may well give us pause. When received ideals are in flux the judicial process, especially in the application of legal standards, loses clarity and precision. The multitude of regulations required by an urban, industrial society encountering the pioneer habits of self-reliance and private judgment which have come down from the past make the time seem one of disrespect for law. New opportunities for organized crime when the local agencies of prevention and detection, which were devised for a rural, agricultural society, have to function in an urban, industrial society and in the face of inventions which have made crime no less than business transcend state lines, create an appearance of growing lawlessness. The inadequacy of the judicial organization and legal procedure of the past century to deal with the mass of litigation arising in our great urban centers leads to widespread complaint and popular dissatisfaction with the administration of justice. The growth of administrative agencies and increased reliance upon administrative tribunals and the shift to executive leadership in our polity seem to threaten the fundamental dogma of supremacy of the law. But on more critical view we may be assured that these are normal phenomena of transition from a stable to a creative era.

Let us remember that the period after the Revolution was marked by Shays's Rebellion, the Whisky Insurrection, and Dorr's Rebellion. Let us remember that the classical period of our law had its roots in popular discontent with law and its administration. It flourished when law and lawyers were more mistrusted and legal institutions were more vigorously denounced than at

any other time in our history. The best lawyers of the time long had grave doubts. Kent felt that the Louisiana purchase was something not contemplated by the founders of our polity and threatened a breakdown of the Constitution. The federalist lawyers were full of alarm at the lack of respect for authority, carelessness of tradition, and institutional waste which went with Revolutionary France and were propagated by Jeffersonian democracy. We must not forget that the appointment of Story as justice of the Supreme Court of the United States was received with indignation by the solid and respectable elements of the society of his day as threatening subversion of law and of authority.

Indeed, in many ways we are much better prepared for an era of legal growth than we were in the period after independence. We have had a century and a half of independent legal experience, where then we had none. We have a highly developed system of legal education, with excellent law schools, full law libraries, and strong, well-trained teachers in every part of the land, where then a law school was only an expanded law office, American lawbooks were no more than manuals for magistrates or for constables, libraries were few, and teachers devoting their whole energies to scientific study and exposition of the law were a matter of the remote future. We have recorded American experience of decision and American legislation to build on, we have authoritative American materials to adapt and reshape, where then we had to do what we could with the English reports and texts and statutes of the seventeenth and eighteenth centuries. We have a richer and fuller science of law to aid us, and that science, as we are called on to deal with economic and social and political problems, is reinforced by highly developed social sciences which were then, if existent, in their beginnings.

It is true the courts will not be able to do the work they did so well in the classical era. One hundred years ago the Supreme

Court of the United States had before it, as shown by 8 Peters, which covers substantially the same period of time as the October Term, 1933, the last fully reported term of that court, sixty-three cases. There were seven justices, so that the ratio of cases to be considered to the man power of the court was nine to one. Today, nine justices have to look into—or at least had to look into at the last account—one thousand and twenty-one cases, or a proportion of one hundred and thirteen plus to one. In New York in 1835 there were in all ten judges: a chancellor, a chief justice, and two justices of the Supreme Court, and six circuit judges who were also vice-chancellors. Today there are one hundred and thirty-three judges of equivalent jurisdiction, or thirteen times as many. But while the ten judges, so far as the reports show, had before them only one hundred and twenty-six cases calling for report, the one hundred and thirty-three judges now have before them four thousand four hundred and forty-two cases calling for mention in the reports, or thirty-five times as much judicial work of a corresponding nature. If we look only at appellate work, where creative judicial achievement must take place, in 1835 four judges and sixteen senators—and the latter seem to have been of very doubtful help—had before them sixty-two cases, or a ratio of substantially three to one. Today in New York, thirty-five judges on the average have before them three thousand seven hundred and two cases, or a proportion of more than one hundred to one. A like story can be told of our appellate courts almost everywhere.

Obviously the courts are not likely, unaided, to prove equal to a purely judicial development of the law adapting the authoritative materials of the nineteenth century to the demands of the twentieth. Probably they will be able to do little more than give authoritative form to what has been worked out and formulated by others. For it is not merely that the judges of today are compelled to work rapidly and with a minimum of deliberation. In

order to hear at all the great volume of cases that comes before them, the time allowed to counsel must be greatly abridged. Where a century ago counsel were heard until every detail had been gone into thoroughly in oral argument, today the highest court of the land restricts argument to an hour and a half to counsel upon each side, and in more than one state court the allowance is but half an hour.

As our jurists give over the purely historical method which governed almost exclusively in the latter part of the last century, as efficacy of effort, already part of the social and political creed, becomes part of the juristic creed, the law teacher and law writer must more and more be our reliance. Already he is doing the brunt of the work in the restatement of the law which, as I think, is putting the nineteenth-century law in shape to be the basis of a new start, as Blackstone and Kent put the seventeenth- and eighteenth-century English law in form to be made into the common law of America by the judges of our formative era. But we may expect much more of him, for today the teacher of law works in the conditions of permanence and independence which were the strength of the common-law judge. He may do historical, critical, and analytical work which would be impossible, even if in place, in a modern judicial opinion. What is more important, he may deal with the law and with departments of the law and with subjects of the law as wholes, while a court must look at each piecemeal. Questions of law have ceased to be local. We are so unified economically that no question is limited by jurisdiction and venue as questions used to be. Questions of law today are likely to be questions of business as well. Creative work cannot be done under *limitations of parties and jurisdiction and venue*.

Even less may the work of reshaping the law be left to occasional legislative commissions or to the intermittent and hurried action of judiciary committees. In such matters as procedure the

judicial councils which have been set up so generally in the past decade will do much. But the ministry of justice, which will take the functioning of the legal order as a whole for its province and give to the problems of peace the continuous scientific study which is so generally given by governments to preparation for war, seems to be a long way off in the English-speaking world. It is in our law schools that we shall find the permanence of tenure, the conditions of work, the continuity of study, the opportunity of treating problems as a whole, the possibility of surveying wide fields, the independence of politics, and the guaranties of training, ability, and scientific attitude which are essential to effective research.

Yet judge and lawyer and law teacher, court and bar and law school must work together, as indeed they are coming to do in a time of conscious coöperation in all walks of activity. Not the least achievement of the American Law Institute has been to promote understanding of each other among the agencies of developing the law and thus to lay the foundation for effective use of the Restatement for generations to come.

A recognized authority on the history of institutions has observed that the characteristic polity of the peoples of Northern Europe, from whom our institutions have their origin, was what he calls *Kleinstädtismus*—small-townism, or, one might say, Mainstreetism. More than this, the measure by which we were brought up to judge all things in the last century was the measure of small neighborhood societies, or small compact states. For American purposes, history meant the era of the city-states in classical Greece, with the rise of Macedon and establishment of Alexander's empire as a tragic ending. It meant the Roman republic of a small Italian country town rising to greatness, with the establishment of the empire as the foreshadowing of the decline and fall which must go with a bigness incompatible with

political liberty. It meant the era of rising nationalism in Western Europe after the Reformation, the English Commonwealth, the Revolution of 1688, the time of Whig supremacy in England, and the era of new self-sufficient commonwealths in America. These were, as one might put it, eras of great small things, of activities of great potential significance carried on in relatively small self-sufficient localities, of world-wide relations and achievements, not of organized men or organized mankind, but of individual men in and through small states.

Our traditional measure of law is this small-townism. We have become big, but we like to picture ourselves as small. We have become economically unified, but we like to think of ourselves as a congeries of economically self-sufficient small neighborhood towns. We seek to try and to value the manifold human claims with which administration of justice has to do in great urban communities by the measure of the small town, the citizen of the small town, and the life in the small town of our formative era. Let us not fear bigness. Whether we will or not, we live in a country of big things on every hand. In 1860 only one person in six lived in towns or cities of over eight thousand inhabitants. Now one in six lives in cities of over one million inhabitants. Such things call for a changed measure, and the finding and application of that measure disturb for a time law and politics, as the finding of a changed measure when we shifted from a colonial to a national regime disturbed the law and politics of the generation after the Revolution. If there has been some retrogression in urban population in the last few years, it is no doubt only a phenomenon of a temporary depression, such as has been seen in like depressions in the past. Urban development may very likely go further still with further conquests of the external conditions of life and of physical nature, and with it will go the call for more laws and so for more law. As the lawyers of one hun-



dred years ago were struggling with problems of adaptation of law to a new country, we must be struggling to adapt it to a big country with all manner of unforeseen questions inherent in its very bigness.

Let our law schools see to it that these problems are approached with courage, with intelligence, with enlightenment. The result will be a creative era no less glorious in legal history than that in which this school was founded.

# THE PROGRESS OF LAW IN THE PROVINCE OF ONTARIO OR UPPER CANADA DURING THE PAST CENTURY

WILLIAM RENWICK RIDDELL

**W**HAT is now the Province of Ontario was long part of France's territory in North America, and was considered valuable only for its furs; the same may be said of the territory further west, including the present state of Michigan.

By the Articles of Capitulation of Montreal, September 8, 1760, all this territory was to be given up to his Britannic majesty. Major Robert Rogers was dispatched to take possession of it, which he did in 1760-1761. After remaining for some three years British territory *de facto*, it was ceded formally by the Definitive Treaty of Peace, concluded at Paris, February 10, 1763, to the King of Great Britain as part of "Canada, with all its dependencies." When the management of the land thus ceded came to be fixed, the Royal Proclamation of October 7, 1763, placed the western limit of the new "government" of Quebec at a line drawn from the south end of Lake Nipissing to where the forty-ninth parallel of latitude crosses the St. Lawrence River, approximately the site of the present town of Cornwall, Ontario. It was decided to leave the land farther west for the fur trade; consequently, the provision in this Proclamation that "all persons Inhabiting in or resorting to our Said Colonies may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England" did not extend to more than a small part of the present Province of Ontario, being applicable in only the eastern section. In 1774, by the famous Quebec Act, which so excited the indignation of the Continental Congress—the Address which was the

exhibition of this indignation later having much to do with the failure to have Canada as the "Fourteenth Colony"—the upper country reaching to the Ohio on the south and the Mississippi on the west was made part of the Province of Quebec, and came under Quebec law, *i.e.*, the *Coutume de Paris* was in force in civil matters, the English law in criminal matters. In 1783 came the important Definitive Treaty of Peace of Paris whereby the independence of the United States was recognized; by that treaty it was agreed that the United States should have all the territory to the right of the Great Lakes and connecting rivers, but it was also agreed "that creditors on either side shall meet no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted." Certain of the states of the Union passed legislation preventing British creditors from recovering their debts in these states, and Britain retained forcible possession of that part of the *de jure* territory of the United States west of Canada, as well as of certain other territory. There was more than once danger of actual hostilities arising in the territory so retained, and at length President Washington sent John Jay, the Chief Justice of the United States, to England, where he negotiated the well-known "Jay's Treaty" of 1794, whereby the United States undertook to pay these debts and Britain to abandon the retained territory. Accordingly, the territory properly belonging to the United States was abandoned by Britain in 1796.

Returning now to the laws, etc., all Canadian territory, both that *de jure* British and that held *de facto* from 1783, was, from the time of the passing of the Quebec Act of 1774, under French Canadian law in civil matters and English law in criminal matters.

The growing population, largely from the south, demanded attention: all the territory of the enlarged Province of Quebec from some distance down from the city of Montreal was con-

tained in the district of Montreal, and all civil litigation in that immense district had to be conducted in Montreal. This was an intolerable hardship for those to the west. In 1788, Lord Dorchester, the Governor General of Quebec, divided the country west of the present eastern boundary of the Province of Ontario into four new districts—Luneburg, Mecklenburg, Nassau, and Hesse. Forthwith, there was erected for each of these districts a Court of Common Pleas with full civil jurisdiction, over which three laymen were appointed to preside as judges to try cases without a jury. Dissatisfaction showing itself in the most western district—that in which Detroit was situated—the lay appointees were removed and a prominent lawyer of Montreal, William Dummer Powell, of Boston birth, was appointed the sole judge—he afterwards became Chief Justice of Upper Canada.

Criminal law was administered by the Quarter Sessions, a bench of magistrates being appointed for each district; serious cases were tried by a Court of Oyer and Terminer and General Gaol Delivery, under a special commission issued by the governor.

Since many Americans who preferred to observe allegiance to their king disapproved of the American Revolution, there was considerable immigration of these loyalists to the northern country still faithful to the Crown. Most of these had had English law, civil as well as criminal, in their homeland, and the French Canadian civil law was distasteful to them. After much complaint, it was decided by the authorities at Westminster to form two Provinces, each with power to make laws to please its citizens. Accordingly, in 1791, an order in council was passed dividing the enormous Province of Quebec, formed by the Quebec Act of 1774, into two Provinces, Upper Canada and Lower Canada, the dividing line being the same as that now between Ontario and Quebec. A very large proportion of the inhabitants of Lower Canada were

French, while most of those of Upper Canada were of English extraction, no small proportion of them being United Empire Loyalists from the south.

At the first session of the Parliament of Upper Canada (held in 1792 at Newark, now Niagara-on-the-Lake), the first law enacted stated that in all matters of property and civil rights the laws of England should apply, and thus these laws, both civil and criminal, became the governing force for our territory, now Ontario.

It had been intended to create a Court of Common Pleas of provincial jurisdiction to take the place of the four local Courts of Common Pleas, but for some reason now unknown this was not done. However, it was provided that all but trivial cases should be tried by jury. Moreover, justices of the peace in each district were to divide their districts, in each of which "divisions" a Court of Requests was to be held twice a month by two or more of them, for the trial of cases involving not more than forty shillings, Quebec currency (eight dollars).

Up to this time, the French method of dealing with the property of a deceased had been in vogue. In 1793, Courts of Probate somewhat on the English model were set up for the grant of probate or letters of administration—these, substantially unchanged, continue to the present time.

In the next year, 1794, came a radical change in the administration of civil justice—the Court of King's Bench for Upper Canada, with the same jurisdiction (with unimportant exceptions) as the Superior Courts in England and with provincial jurisdiction, was created. The local Courts of Common Pleas disappeared, but courts intermediate between the Court of King's Bench and the Courts of Requests were provided for, one for each district, with jurisdiction up to fifteen pounds (sixty dollars); these were presided over by judges specially appointed and commissioned under the great seal. These district court judges were at first laymen, but

at length, after a course of evolution, lawyers were more and more frequently appointed, until 1841, when the district courts became county courts and it was provided that no one should be a judge who was not a barrister-at-law. In the same year, the old Courts of Requests disappeared, being succeeded by our present Division Courts, whose jurisdiction has been considerably increased, and which are presided over by county court judges.

There were very few lawyers in early Upper Canada; in 1797, a radical step was taken regarding the profession. In that year, legislation was passed enabling the lawyers to form themselves into the Law Society of Upper Canada, with power to regulate admission to the bar, etc.; incorporated in 1828, the Society still flourishes—a blessing to the profession and to the public. It is governed by benchers, elected from time to time by the members of the bar. It prescribes the requirements for admission, hears complaints against barristers, etc., and generally exercises supervision over practitioners; no one can practise as a barrister unless he has been called to the bar by the Law Society of Upper Canada. This act, with some amendments, is still in force and the plan of entrusting the governance of a profession to its own members has proved so satisfactory that in this Province the governance of medical men, dentists, druggists, land surveyors, etc., has been given each to its own members—qualifications, ethics, admission, dismissal, all are in the hands of the professions themselves.

Coming back to the supreme court, the Court of King's Bench, it was given the power to frame rules of practice and, except for a short time, it had the power to fix costs. Moreover, it had from the beginning the power to "admit" attorneys. The distinction in England between the attorney who conducted the proceedings out of court and the barrister who conducted the proceedings in court was observed—as it is still observed—in this Province. The Law Society had nothing to do with the attorney as such: he was

admitted by the court. Differing from the English practice, there has never been nor is there now any objection to the same person's being both barrister and attorney (or, as we now call him, solicitor). Only comparatively recently has the Law Society been given the power and duty to prescribe the qualifications and curriculum, etc., of attorneys. No one is now admitted as solicitor without the Law Society's "Certificate of Fitness."

The judges of the Court of King's Bench were originally three in number, the chief justice and two puisnes. In 1837, the number of puisnes was increased to four. But the Province had grown and with the expansion had come the complications of older communities and the need for a Court of Equity. There had been in the old Province of Quebec a Court of Chancery, but when the legislation of 1794 was passed in Upper Canada there was no provision for equitable jurisdiction in the new court. Much agitation for and against a Court of Equity took place. The project of establishing such a court seems never to have been lost sight of; and at length, in 1837, the Court of Chancery for the Province of Upper Canada was brought into existence. The Governor was to be the chancellor, and the judicial powers were to be exercised by a judge—"the Vice-Chancellor of Upper Canada." (It may not be without interest to note that the first vice-chancellor of Upper Canada was the husband of the well-known authoress, Mrs. Jameson.) This Court of Chancery was often under fire; but when, in 1849, it was completely reorganized with a chancellor and two vice-chancellors, it proved itself a valuable part of our legal system until it disappeared in the epochal year 1881.

In 1849, another common-law court, the Court of Common Pleas, was brought into being. It had the same jurisdiction as the Court of Queen's Bench and consisted of a chief justice and two puisnes. At the same time the number of puisne justices in the Queen's Bench was reduced to two.

The original Canada or Constitutional Act of 1791, which provided for the government of the two Provinces carved out of the Province of Quebec of 1774, made the governor and executive council the court of appeal, and in certain cases, there was a further appeal to the King-in-Council. The act of 1794 made the lieutenant-governor or chief justice, together with any two of the Executive Council, competent to hear appeals from the Court of King's Bench. In 1849, a Court of Error and Appeal was erected, composed of the judges of the Courts of Queen's Bench, Common Pleas, and Chancery. This was slightly amended in 1857.

It will be remembered that early in the history of the Province it was provided that cases should be tried by jury. In 1868, legislation of a revolutionary character was passed by the Province of Ontario. (Incidentally, the Dominion of Canada with its several Provinces, including Ontario, which absorbed the territory of the former Province of Upper Canada, had come into being July 1, 1867.) By this legislation, all issues of fact or assessments of damages were to be tried by a judge without a jury, unless either party should require a jury. This legislation has proved so satisfactory that a very large proportion, estimated at over seventy-five per cent, of our civil cases is tried by a judge without a jury.

In 1873, the Administration of Justice Act was passed with the view of making the courts of law and equity as far as possible auxiliary to each other for the more speedy, convenient, and inexpensive administration of justice in every case. Equitable defenses were allowed to be set up in an action at law. Moreover, the right was given to a party to an action to examine his opponent on oath before a master, on the facts of the case, before trial. This has put an end to a considerable proportion of cases and has simplified and shortened the trial of many more.

Then came the revolutionary Ontario Judicature Act of 1881, by which the courts of law and equity were fused into one Su-



preme Court of Judicature for Ontario, with two permanent divisions: the Court of Appeal for Ontario and the High Court of Justice for Ontario. The existing Court of Appeal was to continue with its four judges. The Courts of Queen's Bench, of Common Pleas, and of Chancery were to be divisions of the High Court, with full jurisdiction, legal and equitable; and when the rules of law and equity clashed, the latter were to prevail. In 1904, a further change was made by the creation of the Exchequer Division, with the same jurisdiction as the former three divisions of the High Court. These divisional courts have been abolished. We have now the Court of Appeal with eight Justices and the High Court of Justice (the trial court) with a chief justice and twelve puisne justices.

For some time after the formation of the Province of Upper Canada, the judges of the Court of King's Bench were addressed as "Your Honour"—this was the practice in the old colonial courts. About a century ago, this style of address was altered to "Your Lordship" according to the English custom. The judges of the superior court are "justices," and those of the inferior courts "judges" and addressed as "Your Honour."

Judges of the inferior courts are retired at seventy; justices of the superior court are appointed for life and can be removed only on an address by the Houses of Parliament, as in England. There has been no removal in over a hundred years.

In some cases, there is an appeal from our appellate court to the Supreme Court of Canada and in some cases to the King-in-Council, *i.e.*, in fact, to the Judicial Committee of the Privy Council with members from most parts of the Empire, including Canada.

In criminal cases, except in capital cases, the accused has the right to be tried by a police magistrate or a judge of the County Court—an option exercised in the greater number of cases. If there is to be a trial by jury, it may, except in the most serious

cases, be at the General Sessions of the Peace, presided over by a County Court judge. In other cases, the trial will be before a High Court judge, either at the sittings for civil cases or at a special sitting for criminal cases. An appeal against conviction or sentence can be made to the Court of Appeal; if there is difference of opinion in the Court of Appeal, it may be carried to the Supreme Court of Canada. The Court of Appeal generally sits with three justices; in serious cases there often are five, and there is power to sit with seven—though I have never known this to be done.

There remains something to be said about the legislative powers of the Dominion of Canada and the respective Provinces.

When the Dominion of Canada came into existence under authority given by the British North America Act, 1867, the territory contained therein was subject to Britain—which an American invariably calls “England”—the Parliament of the United Kingdom had absolute power over it. Consequently, all the powers to be exercised by the new Dominion and its constituent provinces were gifts of the Parliament at Westminster. The B.N.A. Act (as it is commonly called) divided the legislative and other powers between the Dominion and the Province. While it is true that the B.N.A. Act was framed by Canadians, none of the powers came from the framers or other Canadians—the whole efficiency of the Act was derived from the Parliament at Westminster which enacted it.

In the many disputes that arose between the Dominion and the Provinces regarding jurisdiction, the solution was to be found in the language of the enactment; and the sole question was one of *intra vires* or *ultra vires*—what powers were given by the superior authority to each.

The powers of Dominion and Province respectively are specifically set out in separate sections of the B.N.A. Act—it may perhaps be stated that the Dominion of Canada, which began its life

in 1867 with four Provinces, has now nine Provinces and certain territories—the whole of continental North America (except Alaska) north of the United States. There are special provisions in the statutes creating some of the Provinces, but I do not propose to deal with these as they are of local interest only.

The provision in the B.N.A. Act giving the governor-general, on the advice of responsible ministers (in reality, on the advice of the minister of justice), the power to disallow any provincial act within one year of its receipt from the lieutenant governor of the province was, for some time after confederation, a troublemaker. It should be noted here that while the governor-general and lieutenant governor are mentioned they are not the active parties in any governmental proceeding—they are a *lucus a non lucendo* and are not in the least responsible for the acts of their ministers. These are but samples of the many relics of former times, when governors did take an active part in directing legislation and administration, which they do no longer and which is now the duty of ministers responsible for every act or omission to the representatives of the people elected to Parliament or legislative assembly. In all Provinces but one we have only one house of legislature; the Dominion still has a House of Commons elected and a Senate appointed by the ruling administration, *i.e.*, the ministry for the time being. Quebec still has an elected legislative assembly and a legislative council appointed by the "Crown," *i.e.*, the ministry; these appointed legislators in Dominion and Quebec are appointed for life.

For some time, the Administration at Ottawa considered itself in duty called upon to scan the legislation of the provinces and disallow any act that seemed to be contrary to natural justice, such as infringement of private rights of property, etc., without compensation, *ex post facto* legislation, and other objectionable legislation. Practically, however, the power of disallowance has

been a dead letter for many years. At length, in 1908, the Minister of Justice (an Ontario barrister, by the way) laid down this principle:

"It is not intended by the British North America Act that the power of disallowance shall be exercised for the purpose of annulling Provincial legislation, even though Your Excellency's Ministers consider the legislation unjust or oppressive, or in conflict with recognized legal principles, so long as such legislation is within the power of the Provincial Legislature to enact it."

In other words, the people of each Province should be allowed self-government and to have such laws as their representatives in the legislature consider proper for them.

Since that time there has been no disallowance, except in legislation beyond the powers of the legislature.

This is not unlike what took place in respect of the power "to disallow the Act" reserved in the B.N.A. Act to "the Queen in Council within two years after the receipt" of a copy of an act of the Parliament of Canada by the Secretary of State at Westminster. This power has been exercised only once and, then, at the request of the ministry at Ottawa. Canada was left to pass such laws as she saw fit. Now, since Canada is a free and independent nation, one of the nations of the British Commonwealth of Nations, and no more subject to Britain than Britain is to Canada, there will never be any further interference with her legislation.

In addition to the ordinary jurisdiction of the courts to determine through litigation the validity of any legislation of Dominion or Province, the Dominion has provided that the Supreme Court of Canada shall pass on the validity of any legislation of the Dominion. Ontario has made similar provision for referring the validity of its legislation to the Supreme Court of the Province. By this legislation, the courts exercise a jurisdiction which the

mental notion of human dignity and worth, of marked individualism, of a spirit of democracy as between man and man, high and low, rich and poor, was a marked trait of Spanish character from early times. It has persisted among those of Spanish descent in America.

Local privileges were jealously guarded against encroachment, and the chief justice of Aragon had power to stay the illegal acts of the monarch. Law and respect for the law was the third ruling passion of the Spaniard of that day. Columbus's men and the *conquistadores* and colonists who followed not only were imbued with the spirit of individualism, individual liberty, and regional personal law, but had an ingrained fondness for legal rituals that has never been equalled.

Columbus's sailors were, I do not doubt, deterred from carrying out their threatened mutiny by a knowledge of the legal penalties entailed by an infraction of the sea laws. On landing, Columbus's first act was to take formal possession of the newly discovered land by an elaborate procedure, charged with all the solemnities of the law and duly recorded by the notary. Similar "acts of possession" (very like those still in use today when government grants of mines and public lands are made) were used by all the conquerors. In contrast to the later haphazard settlements in the British colonies, the founding of cities and towns was subject to minute regulation and accomplished by equally elaborate legal formalities. The detailed regulations for town planning<sup>7</sup> have had a permanent influence, accounting for the similarity of the small Spanish American towns. Several of the *conquistadores* had been lawyers or students of law—Cortés, Quesada, Enciso, Pedrarias Dávila—others found lawyers at hand to help them solve the legal problems created by their thirst for power. Cortés, faced with objections to the sufficiency of his power of attorney, resorted to the stratagem of having his powers

confirmed by the *ayuntamiento*, or municipal council, which he had set up. The civil wars in Peru had their origin in a boundary dispute between Pizarro and his rival de Almagro, and the refusal, on the ground of fraud, to abide by an arbitration award. The murder of Atahualpa was carried out, not without protest from those more respectful of the substance of the law, after going through the form of a trial, sentence, and execution. Pizarro's successor, Pedro de la Gasca, a learned and incorruptible lawyer to whom popular fame has not accorded the honor due, restored with consummate ability the reign of law where violence had prevailed. Unskilled in arms, he had on his side the majesty of the Law. The legal history of the conquest and early colonization would furnish many an interesting chapter. The problem then, as today in regions remote from central control, was to curb, under the reign of law, the rapacity and greed of the occasional bold and unscrupulous individuals. It is a tribute to the law that they showed at least an outward respect for it; a trait that has survived in their descendants—the modern dictators.

The law of Spain that was brought to the colonies was a fusion, then almost complete, of Germanic and Roman elements with an injection of Arabic<sup>2</sup> and vestiges of early Celtiberian influences. The Germanic elements were to be found in the Visigothic Code,<sup>3</sup> the numerous *fueros* or special laws, charters, and customs of the nobility and towns and for Castile, the general *Fuero* or *Fuero Real* (1255), an early but unsuccessful attempt at unification, the *Ordenamiento de Alcalá* (1348), the *Leyes de Toro* (1505), and the compilation of prior enactments, known as the *Nueva Recopilación* (1567). The Germanic elements were especially notable in the law of family relations, real estate, and inheritance. The Roman-law influence found its supreme expression in the famous *Siete Partidas* of Alfonso the Wise. This code or treatise was an adaptation of Roman law for practical use in

Spain. Published in 1263, it did not receive the force of positive law until 1348 (by the *Ordenamiento de Alcalá*). Enacted as a subsidiary law, it rapidly gained preponderating influence, due to the predilection of judges and jurists for the Roman law. Roman law, soon after its revival in Italy, gained a firm foothold in Spain, from which it had never completely disappeared. The fame of the University of Salamanca (founded in 1243) was equal, if not superior, to that of the Italian universities. The greatest influence of the *Siete Partidas* was in the law of obligations and procedure. It is still a source of law frequently consulted in all Spanish countries and not without some importance in Louisiana.<sup>4</sup>

The law of Spain was not uniform. It differed in the different Kingdoms, and locally, by virtue of the *fueros* or charters of special privileges and customs, in the different towns or districts. It was the law of Castile that was declared to be the law applicable in the Indies, but the majority of the immigrants were not Castilian, but from other parts of Spain. Naturally, they brought with them their local customs and the remembrance of their special *fueros*. Where the settlers were homogeneous, it is proper to surmise it was this personal law that they respected, not the dictates of the Castilian legislator. Their strong individualism might take the form of passive resistance to law imposed from above, and yet be not inconsistent with respect for what they considered the true law. I am unable to cite authority, but I cannot escape the conviction that here is to be found the germ of many differences in the real law of the scattered republics, and also one of the original factors contributing to the spread of the antagonism between the real law as lived, and loved, by the people and the law on the statute books.<sup>5</sup>

For that is the heart of the problem, then and now. How can we reconcile and understand the curious combination of an out-

ward respect for legal formalities and rituals, evidencing a real reverence for law, and a complete disregard of the substance and essence of parts of the written law?

The Spaniards did not enter upon an uninhabited region. Their principal settlements were made where there was a dense Indian population, and precisely for that reason. The Indians were useful workers; by their labor, the conquerors could obtain from mine and field the wealth, and more important, the social power and prestige they sought. They themselves, and their descendants, disdained manual labor as unworthy of their ennobled estate. This Indian population had its own customs; in the Inca and Aztec empires, perhaps also among the Chibchas, Nicaraguans, Mayas, and others, there was a well-developed legal system—definite laws, independent judges, and, certainly among the Aztecs, lawyers. The Indian markets, which have persisted to this day practically unchanged in the small towns, were especially well regulated; so were irrigation, land tenure, and inheritance. In Peru, a feudal communistic regime prevailed. The Indian laws and customs have had a decided effect on the real law of the present day. For the purpose of better collection of taxes and of putting the Indians to profitable labor, the conquerors took over much of the tribal organization of the aborigines. The transition of the masses from their native overlords to the new Spanish masters was easy—and often to their advantage. The present-day hacienda is the lineal descendant of the Indian feudal estate. Land tenure as actually existing (*not* as found in the codes) has continued little changed, both in the relations of the Indian tenants or laborers to their white masters and in the Indian communities themselves. The record title to the land may be held nominally in the name of a chief man, but actually in a species of trust for the community. Other instances of the continued prevalence of the aboriginal law, known to the sociologist, ig-



nored by the book jurist, might be multiplied. Wholly apart from the few savage tribes that still roam the forests, large masses of the Indian population in the highlands of Central America, Colombia, Ecuador, Peru, and Bolivia, living among and ruled by the descendants of the Spaniards, have never been assimilated; their adoption of Spanish law is as superficial as their Catholic religion. Representing in some countries fifty to eighty per cent of the total population, they are an unsolved problem. Here we have another instance generative of the contrast between the actual law and the law of the books. The Indian population has presented a stolid wall to the effectivity of statutes.

The fundamental Castilian legislation on civil, commercial, and penal matters, brought to the colonies, remained unchanged. The vast mass of orders, decrees, and regulations issued for America were concerned chiefly with the administrative, fiscal, and ecclesiastical organization of the colonies, the conversion and education of the Indians, and their protection against exploitation. This confused mass of legislation was brought together in the compilation known as the Laws of the Indies.<sup>6</sup> This code was specific colonial law, but dealt very little with the private law affecting the Spaniards among themselves, who continued to be governed by Castilian law as subsidiary to the Laws of the Indies. As far as concerned the Indians, the spirit of these laws was inspired by the highest humanitarian motives. It was not an easy problem with which the Spanish legislator had to deal. It was solved, if not successfully at least better than in the English colonies and better than in preconquest days under native rulers. Survival, not extermination, has been the result, with grim possibilities of predominance in the near future.

The task these laws set was too difficult of complete realization. The preambles to the different laws show repeated disregard and violation of many of them. In vain were penalties piled on

penalties, ranging from the comic to the extreme of cruelty. This faith in penalties has persisted in spite of its ineffectiveness. The severer the penalties, the more they were disregarded. The task of ruling the colonies from Spain was superhuman, yet the colonies could not be made self-governing. The Indians could not be left (as the sequel has unfortunately proved) to the mercy of the conquerors and settlers, nor, consistently with the noble purpose of Christianizing them and raising them to the level of European culture, could they be left to themselves. If the humanitarian purposes of the laws were not more effectively realized, if the rights of the Indians, nobly envisaged in the written texts, were in practice given scant attention while their duties were rigorously insisted upon, the phenomenon is readily understandable. A few Europeans were in command over hordes of natives in vast territories difficult to administer and control, with few means of communication. How check abuses and punish the guilty? The result was a constant attitude, on the part of the native Indian population toward their white or mestizo rulers, of suspicion and submissive terror, with occasional outbreaks of blind revolt. There is a wide difference of opinion today regarding the persistence and depth of this latent racial hatred and the danger of the Indian becoming menacingly vocal.<sup>7</sup>

A measure, however, of self-government and democracy had been preserved in the typically Spanish institution of the municipal council, the *ayuntamiento* or *cabildo*. Much as the Englishman took his common law to North America, so the Spaniard transplanted the *ayuntamiento* to the colonies. It was in the *cabildos* that the first cries of revolt were raised and independence declared (1810). The municipalities were organized with a mayor (*alcalde*) and aldermen (*regidores*). Elected in the first instance (except in special concessions to new discoverers) by the residents of the district, they generally elected their own successors

annually, but it was customary, when important matters were to be discussed, to call in all the leading persons of the community to an open meeting (*cabildo abierto*). The laws of the Indies provided for a similar form of government for the Indian towns and mission settlements, with Indian *alcaldes* and *regidores*, elected annually in the presence of the parish priest.

Brazil, of course, was governed by Portuguese, not Spanish, law. The Portuguese law did not differ very radically from the Spanish; Romanized earlier and more completely, it was freer from Gothic and Arabic influences. It had been codified, or rather compiled, first in the *Ordenações affonsinas* (1446-1457), revised in 1521 as the *Ordenações manuelinas*, and finally in the *Ordenações Philippinas* (1603), also known as the *Código Philippino*. These last-named "ordinances" remained as the fundamental civil law of Brazil until the adoption of the new civil code in 1917.

In 1805, shortly prior to the declaration of independence of the Spanish colonies, a new compilation of Spanish law had been promulgated, known as the *Novísima Recopilación*.<sup>8</sup> It was not put into effect automatically in all the colonies, but after independence was either expressly or practically recognized as embodying the Spanish law, which remained in force. However, it did not repeal but expressly left in force prior enactments.

It would be difficult, without more extensive research than any one has yet given to it, to form an accurate idea of the administration of justice in the colonies. On the whole, the *audiencias*<sup>9</sup> or highest courts of appeal in the vice-royalties and captaincies-general were made up of honest and impartial judges, learned in scholastic law, with a select and honored bar, the members of which were entitled to many of the privileges of nobility.<sup>10</sup> The chief defect was the interminable delay in litigation. Professor Ireland cites one instance wherein after fifty years the plaintiff

made a motion mildly complaining that it was time for a decision. This tradition of delay has persisted to our day. Little has been done, in practice, to correct it. Reading the terms categorically prescribed in the existing codes of procedure, one admires the rapidity of process provided for, but the truth, alas, is far otherwise.

Another defect was the system of multiple appeals. Invariably there were courts of second and third instance—sometimes more. In certain cases, appeals under one name or another went to Spain, the Council of the Indies sitting much like the Privy Council in England.

This system of multiple appeals also has been inherited. There was an explanation for its existence in colonial days—the further one got from the capitals, the less able and the more subject to venality became the judges. In the remoter districts, removed from effective control, impartial justice was neither attained nor expected in the lower courts. This is still true. Decisions, except in clear cases where local opinion will not sanction glaringly unjust or illegal decision, will go occasionally by bribe, more often by personal favor and political influence. But in some of the smaller countries where the volume of legal business is not large and the judges are not overburdened, it is hard to see why appeals should not go direct to the supreme court, instead of having to pass through intermediate courts of appeal.

In commercial matters, disputes in colonial days were settled more rapidly. The merchants not only formulated their own customary law, but organized their own courts. Spain's contributions to the law merchant were always of outstanding importance. Barcelona claims the honor of originating one of the oldest and most famous codes, the *Consulado del Mar* (thirteenth century). The Ordinances of Burgos (1511, 1537, 1572) and the still more famous Ordinances of Bilbao (1737) were complete

and, for their time, remarkable commercial codes, from which much was adopted in other European countries. The Ordinances of Bilbao soon came to be the law merchant of the Spanish colonies and continued in force long after the independence; *e.g.*, in Uruguay until 1865, Chile until 1867, Paraguay 1870, Guatemala 1877, and in Mexico as late as 1884. Book IX of the *Novísima Recopilación* (1805) compiled for the first time all existing commercial law, including many of the Ordinances of Bilbao. The decisions of the commercial court (*consulado*) of Bilbao enjoyed wide authority. Similar organizations of merchants and mercantile courts existed in America and appear to have functioned well. This may help to account for the fact that Latin Americans have continued to maintain the needless distinction between "civil" and "commercial" law, with separate codes and embarrassing conflicts—a distinction of little value once commercial courts, with merchants sitting as judges and lawyers merely as advisers, were abolished.

Burdensome restrictions on commerce existed, but they were persistently and flagrantly violated by continuous smuggling, contraband, and other illicit practices, often with the connivance of the officials charged with their enforcement. This aggravated the lawbreaking habit in matters not in harmony with the economic interests and temperament of the people.

In addition to the reflex development of the law merchant, the Spanish colonies made a striking original contribution to the world in the field of mining law. The earlier ordinances were those of Peru (complete compilation, 1683); more important were the later ordinances of New Spain or Mexico (1783). The latter constitute the basic foundation of present-day mining codes of Latin America and of our own Western mining law, and have greatly influenced the law throughout the world. They were the work of local people and adapted to local conditions, instead of

being either dictated from Spain or servilely copied from foreign legislation. It was recognized that local conditions were totally different from those of the mother country. Hence they received and their successor codes have continued to receive, popular adherence. The same was true of other law which the colonists adopted for themselves—the law of the range and the roundup, the division of water, etc.

At the time of independence, then, we find Spanish America governed theoretically by the extensive legislation of Castile and the special laws for the Indies, but only so much of this law was actually enforced as suited the colonists. In the two major industries, mining and agriculture (including ranching), the law was in harmony with the facts. Land titles, for the Spaniards, were reasonably secure, and the land tenures and feudal relations of the Indians to their Spanish overlords were satisfactory. In commerce, also, relations between merchants were satisfactory; they disregarded the government prohibitions as nearly as though they did not exist at all. On the other hand, the very rich and powerful were above the law; neither the criminal law nor the ordinary processes of the civil law were effective in reaching them. Abuses of this power were the exception, not the rule. Social and moral sanctions, the force of the opinion of neighbors and of the Church, the effective work of lawyers out of court were more binding than paper statutes and dilatory courts in procuring substantially complete justice and equity among the colonists themselves and a happy and prosperous existence. Fair treatment, according to the scanty light of the times and granting the validity of the premise that they were an inferior caste, was reasonably assured for the Indians.

Dissatisfaction with the law was not among the causes of the movement for independence. The struggle was strictly for no more than independence; it was in no way a revolution. There

was no mass uprising. It was an upper-class affair, pure and simple, though here and there one of lower rank distinguished himself. One must not be misled by the language of the early constitutions; they are aflame with all the principles of liberty, equality, and democracy of the American Declaration of Independence and Constitution and of the French Declaration of the Rights of Man. Adopted by idealistic but impractical men, these constitutions were little suited to provide orderly government. The only practical basis for a measure of self-government and democracy, the traditional municipal *ayuntamiento*, was neglected in harking after foreign gods. The idealists, not without armed struggle, were thrust aside by the common-sense landholding aristocrats. The only constitutions that stood the test of time were those of Brazil (1824)—a limited monarchy until 1889—and of Chile (1833), which openly vested control of the government in a comparatively small number of ruling families. But what has been said of Chile, that it was, legally, "a government of the *hacendados*, by the *hacendados*, for the *hacendados*," became, in fact, contrary to the written theories of the constitutions, true of all the countries and is still true of some of them. Chile had long periods of orderly government unknown to the other republics. They struggled with *coups d'état*, revolutions, dictatorships, and military rule for generations. The unsuitability of the written constitutions to the political conditions, the patent contradiction between the fundamental charter and the actual conduct of affairs, the open disregard of many provisions, while not primary causes, were contributing factors to the constant disorders.

This constant civil disturbance was not propitious for the growth and development of either constitutional or private law. The courts might remain closed for years. Radical change of the old Spanish law was not an urgent necessity. So much of the old Spanish legislation as had been accepted in fact continued in

force for generations. There was no dissatisfaction with it in principle; its mass, its contradictions, its inaccessibility were the chief complaints.<sup>22</sup> It was to remedy these defects, rather than from any desire for fundamental law reforms, that the first codes were adopted. The Napoleonic codes, founded on Roman law and not so far removed from the Spanish law, were ready at hand and were adopted without much thought regarding their suitability to native conditions or to the Spanish mentality and traditions of the lawyers, judges, and people. The French civil code was adopted textually, in translation, by Bolivia (1830) and in the original by Haiti (1846) and imposed by the Haitians on Santo Domingo; it was not there translated into Spanish until 1884.

In Peru, a complete civil code was promulgated in 1852, but the first independent civil code, marking a distinct advance in the law, was adopted in Chile (1855), drafted by a distinguished scholar, Andrés Bello,<sup>23</sup> and revised by a commission which held over three hundred meetings. It maintained the fundamental principles of the Code Napoléon, especially as to the sanctity of the family and of private property, but made some important modifications to accord with the family relationships of the Spanish law. It did not pretend to be an original work, but culled what appeared to be the best views of the commentators on the French code and of other modern Continental jurists. It was more complete than any other of its time and its draftsmanship is excellent, rivaling in clarity its model. Parts of it have been adopted by a majority of the Latin American republics, and it was almost textually adopted in Colombia (1873, 1887), Ecuador (1861, 1887), and some of the Central American republics. The best commentary is by an Ecuadorian, Borja.

President Juárez of Mexico in 1857 appointed an eminent lawyer, Dr. Justo Sierra (1814-1861) to draft a code; his project was based principally on the draft of a civil code for Spain by



García Goyena. The first two books, after revision by a commission, at many of whose sessions the Emperor Maximilian took an active part, were promulgated during the empire. After the fall of the empire, a new commission was appointed and its labors resulted in the Civil Code of 1870. A new code was promulgated in 1884.<sup>13</sup>

The next civil code of interest was the Argentine (1869). Argentina, with the accession to the presidency of Bartolomé Mitre, one of South America's greatest statesmen, had entered upon the stupendous development of her vast resources, which has made her one of the great nations of the earth. The code was drafted by Dr. Vélez Sarsfield (1801-1875). Half of the articles were reproduced in some form or other from the Code Napoléon; other sources were the Chilean code, a draft for Brazil (1860-1865) by Teixeira de Freitas, "the most eminent constructive jurist of Latin-America," French and Spanish commentators, and a few minor sources. The code was adopted by Paraguay (1887) and influenced the Uruguay code amendments and many of the later Latin American codes. Vélez Sarsfield's work is almost wholly lacking in originality in the sense that every article of his code can be definitely traced to some preëxisting foreign code or commentator. Where he exercised with success for the most part the highest talents of a jurist was in purifying his sources from contradictions and ambiguities, in choosing the provisions and interpretations best adapted to the peculiar problems presented, and in setting forth complicated legal rules in clear and terse language. The fact that the code on the whole has well stood the test of time is a tribute to the skill and care with which the selection was made, and the remarkable progress of Argentina is evidence that it was suited to the needs of the country.

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cial mention. Some of them are bad specimens of pure scissors and paste. Their chief merit is that they did away with the cumbersomeness of the old Spanish legislation. In many instances, they were not the work of the legislature, but promulgated by presidential edict—some cause of gratitude to dictators. Even the Chilean and Argentine codes were enacted under the persuasive influence of a strong executive.

All these nineteenth-century codes were, viewed retrospectively, somewhat academic. They contain many provisions that are purely theoretical and not likely to be used in daily life or applied by the courts. In one respect, they were, however, fully in harmony with Spanish American ideas. Until very recent years, Spanish American home life had been well-nigh ideal. The social unit, for the purposes of the law, was not the individual but the family. The codes and laws generally cannot be fully understood if this fact is not borne firmly in mind. Marriage was the sacrament consecrated by the Catholic Church, an indissoluble tie. Absolute divorce was, therefore, not permitted—only separation or annulment by ecclesiastical authority. The family property was to be kept intact; the father and husband was in effect a trustee for the whole family; community of marital property<sup>14</sup> (conjugal partnership), also for the benefit of the family as a whole, was the rule, but the husband had the sole management of the family property, the wife not being *sui juris*. Abuse of the husband's trust was, in practice, exceptional. Disinheritance, except for grave cause, was not permitted.

Another concept that may be said to underlie these earlier codes was that law was an abstract, logical science, identical for the whole world or at least the modern Roman-law world. All that a codifier was expected to do was to formulate the "best" legal rule and harmonize all provisions of the code. Eclecticism therefore came naturally. More attention was paid to the views of

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foreign jurists than to practical necessities and actual conditions of life and social customs in each country. They contain, for instance, elaborate provisions for antenuptial contracts and the wife's dot; in fact, neither has entered into Spanish American social customs. Marriages are love affairs or for social prestige, but with little thought to property.

The codes paid little regard to the interests of the vast mass of the population—the Indians, the Negroes, the small farmers, the petty traders. The codes were largely for the upper classes only, especially the landed aristocracy—not consciously or intentionally so, but as a result of abstract theories and copying from European jurisprudence. Even for the landed interests, they were in a few particulars insufficient. Colonial titles were often vague, boundaries indefinite; estates passed on from generation to generation without partition proceedings; *indivisos* became the rule. No realistic view of this difficult situation was taken. In several countries, wholly apart from the social-political necessity of agrarian reform, the land laws need revision.

These codes, as regards the inviolability of both property rights and family relations, were extremely conservative and followed canon law and the closely allied natural-law concepts. They have in general suffered few direct amendments, but from time to time, especially when anticlericals gained political power, special statutes have been passed modifying certain provisions of the codes. Among these may be mentioned laws making civil marriage compulsory and permitting divorce (sometimes later repealed), and one curious instance, counter to the contemporary trend of thought, permitting full testamentary liberty to dispose of property, subject to the obligation to furnish support to needy descendants, etc.<sup>15</sup> This is said to have been due solely to the influence of a single high official who had quarreled with his family.<sup>16</sup> But, in general, modern "liberal" ideas did not begin to assert

themselves until well into the twentieth century. Of late years, there has been an increasing tendency to make civil marriage compulsory,<sup>17</sup> to permit divorce even by mutual consent,<sup>18</sup> to enact legislation regarding married women's property and either enlarging their legal capacity or making them fully *sui juris*,<sup>19</sup> to liberalize the treatment of illegitimate children,<sup>20</sup> to enact restrictions and limitations on the use of property,<sup>21</sup> to favor tenants rather than landlords,<sup>22</sup> and in general to enact social and labor legislation on a broad scale.<sup>23</sup>

Of the modern civil codes, we must mention the Spanish Code of 1889, in force in Cuba, Porto Rico, and the Philippines, and influential in all later legislation in Latin America; the Panama Code of 1916; the Brazilian Code of the same year; and finally the recent Mexican code, in many respects profoundly revolutionary. The Venezuelan Code of 1916 is modeled generally on the Italian code, and the first part (1931) of a new Guatemalan code in course of preparation is inspired in part by the German code.

The first draft for the Brazilian code was made by Teixeira de Freitas (1860-1865) and published by him under the modest title of Sketch (*Esboço*) for a Civil Code. His view that it was necessary to combine the civil and commercial codes has, unfortunately, not been followed either in Brazil or elsewhere. The project dragged along under one commission and another, until Clovis Bevilacqua took it in hand (1899); Bevilacqua's draft was subject to exhaustive examination, discussion, criticism, and revision.<sup>24</sup> It shows the influence of German legal science, but was still strongly conservative, not innovating hastily on the legal traditions of the country. While giving to married women greater equality than previously existed, marriage remained indissoluble and liberty of testamentary disposition was restricted, where there were forced heirs, to one half the estate.

The Panama code permitted absolute divorce, even by mutual

consent, and disinheritance, subject to the duty of support, but in most respects followed closely its models (the Spanish Code of 1889, the former Colombian code that had continued in force, and other codes) and is not innovatory.

With the Mexican code, we enter into a different concept of law. It is not a mere liberalization, but a radically new conception of law and codification. It is an attempt, long delayed, to carry out in private law the revolutionary constitution of 1917. Half of the articles, it is true, are carried over from the former code, but in contrast to all previous Latin American codes, it is not based on the idea (implicit in the others) that it is dealing primarily with a propertied class, but on the contrary it recognizes that the bulk of the Mexican population is as yet made up of the ignorant and illiterate poor. Ignorance of the law may be an excuse.<sup>25</sup> The concept of property is no longer that of the French code, an absolute right of the owner to do what he pleases with his own, but on the contrary property is vested with a social purpose and is fully subject to limitations and reservations, impossible not only by statute, but by the courts, in the social interest.<sup>26</sup> On the human side, men and women are given full equality (this had been accomplished largely by the Carranza decree of 1917 on family relations); divorce is permitted and the grounds enlarged (including mutual consent); a medical certificate is prerequisite to a marriage license; civil marriage is obligatory; homesteads are provided for;<sup>27</sup> the lessee is favored; new liabilities for torts are imposed; the concept of unjust enrichment is enlarged in favor of the poor;<sup>28</sup> and generally, without elaborating the details, the spirit of modern revolutionary legislation is evident throughout the whole code.<sup>29</sup>

The constitution of 1917, this civil code, and other recent Mexican legislation are making a profound influence on Spain and on all the Latin American countries. The *intelligentsia* of many of

the southern countries, self-appointed labor leaders, university students, and young professors look to Mexico as an example and inspiration. Extreme nationalism has been a predominant feature of legislation everywhere in the last few years. Anti-imperialism, anticapitalism are rallying cries. The rights of the Indians are vociferated by their volunteer spokesmen. The Mexican revolution was not, however, an industrial proletarian revolution but an agrarian one. Severe agrarian legislation was passed, but the agrarian movement is now waning. Many vast estates have been left practically intact, and the fundamental relations of *patron* and *peon* have been little changed in practice. Barring the increasing frequency of strikes imposed from outside and of labor demands, and the increasing burden of taxation, life goes on much the same as before in Mexico and Latin America generally. The dire effects that were predicted by the conservatives have failed to materialize. It takes more than legislation, inconsistently enforced, to change the traditions and customs of generations. Court and administrative decisions are still based largely on personal favoritism. We see once more the outstanding characteristic in Latin American history—the contrast between the written texts of the constitution and statutes and the daily life of the law as exemplified in current dealings between man and man.

As in colonial days, we find social sanctions happily more effective than legal sanctions. Most of the actual life of the law lies wholly outside the statute books and law reports and is to be found only in customs and traditions and in business usage. Hundreds of laws on the books have never been carried out in practice and thousands of rules have little bearing on daily life. On the other hand, the courts are neither a source of law nor looked to for its enforcement. By and large, the Latin Americans are not litigious. Their sense of personal dignity, their *pundonor*, is often a bar to enforcing their rights by litigation and their general atti-



tude toward the courts and trial lawyers is defeatist and pessimistic. No adage is more frequently heard or carried out than that a bad settlement is better than a good lawsuit. Public opinion, and the private advice of trusted lawyers, leads the mass of the community to do the right thing, to respect rights and perform duties, to iron out disputes by friendly negotiation or arbitration, and to carry out, not neglecting solemn formalities, its conception of the real law that it has inherited, accepted, and respects.

This Latin American system of law cannot be dismissed *a priori* as inferior to ours. It has worked, for a hundred years, reasonably well. Daily life has been maintained among the ruling class fully as happy, prosperous, and frictionless as ours and less litigious. Public opinion, acting directly, has recognized law and enforced the legal rights of parties. Lawyers are necessary, but is it true, as generally supposed, that *courts* are absolutely essential to the functioning of a system of law? Our system presupposes enlightened and independent courts. A judiciary possessed of the necessary character can be maintained only by the force of preponderant public opinion. If that breaks down, the system would break down. Why cannot public opinion, then, act directly to enforce the legal system, instead of indirectly through courts?

But a crisis has now been reached in Latin America. Family ties are disintegrating, the moral influence of the Church is waning, neighbors are no longer social equals and friends but heterogeneous groups or soulless corporations, the old human bonds between master and servant are giving place to inchoate industrial relationships. The courts as now constituted are of a caliber inadequate to step into the breach. To build up an enlightened and independent judiciary, in which the public may repose full confidence, basic ameliorations in education for character and in the social structure are indispensable. Training for a new law is only a part, a small part, of a vast educational need. It may well be

that law reform will be won on the new football fields of South America.

We have given preferential treatment to the civil codes because they form the basic common or general law. The new constitutions<sup>30</sup> embody aspirations but are not self-enforcing. They must be carried out by statutes, and statutes in turn by executive regulations. In this slowing-up process, conservative tendencies show themselves. We are, therefore, justified in passing more lightly over the constitutions and the other codes in order to bring this article within reasonable compass.

Of the mercantile codes, the first were either reproductions of the French<sup>31</sup> or of the valuable Spanish Code of 1829.<sup>32</sup> For the most part, as we have noted, the Bilbao ordinances continued in force. The Brazilian code (1850), based on the French, Spanish, Portuguese, and Dutch codes, and to a certain extent incorporating British law and practice, was a good one for the times and, with amendments, is still in force. Its practical value has been enhanced by Orlando's commentaries, which have run through several editions. The later codes in other countries<sup>33</sup> were not especially meritorious. Many were already antiquated when adopted. Changes in business methods and practices were ignored. With the enactment of the new Spanish code in 1885, which has been closely followed,<sup>34</sup> an improvement set in. Nevertheless, Latin American jurists until very recently have never shown much interest in or seem to have well understood business conditions. Traders were better off left to their own devices and to mercantile customs, for the effective legal force whereof several of the codes fortunately left ample provision. A keen business man in Latin America is often a better practical lawyer than his legal adviser. As business, especially international trade, has been largely in the hands of foreigners, it is in the field of mercantile law and closely allied topics of the civil law that the influence of the common law

has exerted itself most strongly; negotiable instruments, warehouse receipts, bills of lading, insurance, chattel mortgages and crop liens, conditional sales, corporate securities, and banking all show directly or indirectly the influence of the common law. Our Uniform Negotiable Instruments Law has been adopted by Panama<sup>35</sup> and Colombia;<sup>36</sup> Panama's corporation laws are based on those of the United States; the monetary and banking laws of the countries visited by commissions headed by Dr. Kemmerer are closely modeled on American law; Panama some years ago incorporated into her legislation our law of express equitable trusts (*el nuevo fideicomiso*<sup>37</sup>), and Mexico did so the following year<sup>38</sup> and more recently in the Law of Credit Instruments and Operations.<sup>39</sup> Porto Rico presents an interesting example of a fusion in progress between civil and common law. The American military government in Cuba and Santo Domingo also introduced many reforms and new methods by executive order, later kept in force in the legislation of the republics.

The bankruptcy provisions of the old commercial codes never worked well. It has generally been the practice for creditors to work out plans for liquidation and settlement of estates without resort to the courts. Here again the force of public opinion in the trading community has shown itself strikingly to be the real law rather than the statutory provisions. Of late years, there has been in many countries a complete change of the bankruptcy laws.<sup>40</sup>

Of the penal law, I hesitate to speak for lack of personal experience in the field. Ineffective as it was in colonial days, it certainly has been more so in most countries since independence. The old Aztec criminal law seems to have been superior to anything known since. In one or two countries even today notorious criminals are freely at large and the community is not the least bit shocked; it is not only the rich and powerful who now escape, but even the lowly manage to find intriguing influence to help them

evade prosecution. Dictators do not hesitate to commit abuses against their political enemies—exile is mild; murder under the pretext of the *ley de fuga* is resorted to.<sup>41</sup> But political prisoners are in a class apart. In the more advanced countries, however, important contributions have been made to criminology, and recent penal codes<sup>42</sup> are modern, progressive, and, I understand, reasonably well carried out.

The Spanish criminal law continued in force until lately in many countries (in Mexico until 1871 and in Chile as late as 1874, with a few amendments to remedy the most glaring defects). The first nation to adopt a new penal code was Brazil (1830). This, a progressive code for its day, and the other codes of the nineteenth century, which were greatly influenced by it, were based on the principles of the utilitarian and classical schools of penal law (Beccaria and his followers, Bentham, etc.), the concepts of the French Revolution, and the liberalism of the day. They were copied principally from the French code of 1810 and the Spanish codes of 1822 and 1848, again without much regard to local conditions. The Dominican code (1882) is essentially the French code, with amendments. A crime is looked upon and defined, generally, in these codes as a voluntary act disturbing social order and requiring punishment. Exculpatory, attenuating, and aggravating circumstances of criminal liability are defined and applied, based on facts relating to the act or to the mental condition (lack or diminution of will) of the criminal and his greater or less menace to society. He is presumed to be a free agent; the purpose of punishment is to reestablish the moral equilibrium disturbed by the crime and to protect society by the correctional and exemplary power attributed to punishment. The influence of the common law is evident only in the adoption, in many countries, of a modified jury system.<sup>43</sup> The later codes are due chiefly to the influence of the Italian criminologists (Lombroso, Ferri, Garo-

falo); the Argentine (1922), Peruvian (1924), Mexican (1929), Spanish (1932), and Uruguayan (1934) adopted some revolutionary ideas. The Argentine code provides for suspended sentences, fines, and detention at home in lieu of brief imprisonment; it introduces measures for the prevention of crime and asylums for habitual drunkards; poverty or difficulty in gaining a livelihood is an attenuating circumstance; the defense of temporary insanity, etc., is liberalized; abortion is permitted in certain cases; greater freedom is left to the judge. The Peruvian code (1924) was a reaction against the rigid code of 1864. It avoids dogmatic definitions, simplifies the system of punishments and makes them more elastic; the death penalty is abolished; indeterminate and suspended sentences are provided for and greater discretion is left to the judge; a state of need is an attenuating circumstance; ignorance of the law is an excuse for acts not in violation of fundamental morality; fines are imposed according to the income of the defendant and time is allowed within which to pay them. The theory of punishment, as stated in the report recommending the bill, is that "punishment is not imposed for the sake of punishing but as a measure of social security to the limit in which the public emotion aroused by the crime and the defense of the public concur. This limit can only be fixed by the psychology of the delinquent himself."

In Colombia (1920), Chile (1928), and several other countries, children's courts have been established and the judge bases his decisions on the rules of equity and the good of the child rather than on the rigid texts of the law.

It was in the field of civil procedure that the slowest progress was made in the gradual emancipation from the Spanish law. Codes of civil procedure were generally the last to be adopted. The French code would have been too violent a wrench from actual practice. Again Spain furnished the model (1855, 1881).

These codes have formed the fundamental basis of Latin American codes.<sup>44</sup> The procedure is still everywhere unnecessarily complicated—too much paper work; practically no oral proceedings whatever. The merits are beclouded by technicalities. Cases turn on formalities and points of law; the careful preparation of evidence, the chief concern of the common-law lawyer, tends to be neglected by the Latin American advocate. Many of the codes contain curiously antiquated provisions regarding the testimony of witnesses, looked upon with suspicion. Our full and free direct and cross-examination in open court is unknown, except in criminal cases. The procedural codes still follow the main lines of the thirteenth century, faithfully adhered to in Spain in the codes above mentioned.

The powers of the courts are restricted both by rigid code provisions and by an inherited tradition. In Spain, only the text of the statutes was the law; judicial precedents were not preserved or considered of authority; officially, resort to commentaries or the opinions of jurists was discouraged or even prohibited; the interpretation of the laws, in case of doubt, was reserved to the king himself.<sup>45</sup> Consequently, it was not customary to report decisions of the courts either in Spain or in the colonies; only one or two commentaries on decisions of the *audiencias* were written; nor are any published reports available until generations after independence. Indeed, few reports except of the supreme courts are published to this day, and in some countries even these are issued only after several years' delay. In the last few years (following modern French influences) greater attention is being paid to precedents, thus paving the way for the development of a truly national law.

In the dearth of published reports of the courts, and in view of the fact that the codes are in such large part of foreign origin, the Latin American lawyer is compelled to resort to comparative law.

Nowhere else does comparative law become of such practical value. Nearly every treatise of note is a comparative law study, and the contribution of Latin American law to this field of jurisprudence is of high merit. The shelves of prosperous lawyers are filled with foreign books. In the bookstores one is apt to find a more extensive stock of French books and of translations into Spanish from all Continental languages than of national law books. The lower and intermediate courts, on the other hand, are rarely, if ever, supplied with adequate libraries, and the judges are too poorly paid to buy books. Except with a few enlightened and well-educated judges, court decisions are not *directly* influenced by foreign law to the extent one might expect. They turn, rather, on refined, generally casuistic, and narrow interpretation of articles of the codes and statutes, which does not help the evolution or growth of the law. It is to the universities, not the courts, that one looks for progress. Practical conditions and business requirements are rarely taken into account. Equity is unknown in their judgments. The ecclesiastical courts did not lend equity to the law as they did in England. There is a recent tendency, but not as yet strongly marked except in the late penal codes, to give the judge greater latitude. Can he be trusted with it? We revert to the problem that confronted the Spanish Crown.

Together with an interest in comparative law, it was natural that the Latin American jurist should be devoted to international law, private and public.<sup>46</sup> While trade between the countries themselves has not been very important, their citizens moved freely from one country to another, intermarriages were a daily occurrence, and the immigration of foreigners and of foreign capital was constantly encouraged until recent years. Hence, the field of conflict of laws was always of practical as well as theoretical interest to the lawyer. Numerous treatises were published, some of outstanding merit—to mention only a few: Calvo, Al-

corta, Calandrelli, and Zeballos of the Argentine; Bevilaqua and Rodrigo Octavio of Brazil; Elmore of Peru; Alvarez of Chile; Restrepo Hernández and Antonio José Uribe of Colombia; Matos of Guatemala; Pérez Verdia of Mexico; Ramírez of Uruguay; and, above all, Bustamante of Cuba. As early as the Congress of Panama (1826), the idea of a uniform code of international law was broached. It took more definite root with a congress held in Lima in 1879, at which six States were represented and two treaties drafted, one on civil, one on commercial law. Of outstanding importance, both theoretically and practically, was the Congress of Montevideo in 1889, which drafted treaties on civil, commercial, penal, and procedural law, on patents and trade-marks, and on the exercise of the liberal professions. These treaties became law in the Argentine, Bolivia, Paraguay, Peru, and Uruguay. The Pan-American Conferences gave constant attention to the subject of codification of private international law. The labors of the International Commission of Jurists were interrupted by the World War but were renewed shortly afterwards and culminated in the approval at the Sixth Pan-American Conference, Havana, 1928, of the draft code, largely the work of Dr. Bustamante and officially named in his honor the Bustamante Code. It has been ratified by Cuba, Brazil, Santo Domingo, Panama, Guatemala, Nicaragua, Haiti, Peru, Costa Rica, Honduras, Chile, Salvador, Ecuador, Venezuela, and Bolivia.

The code is extensive, 437 articles divided into a preliminary title and four books, *viz.*, on civil law, including nationality; mercantile law; admiralty and air law; and procedure, including extradition. Criticisms can, of course, be made, but it must be borne in mind that in a few particulars it was necessary to abandon both pure theory and the best practical rule in order to attain a working compromise that would be acceptable and reconcile conflicting views firmly established in the laws of some countries. The great-



est rock was that which had split the Montevideo conference: whether the general criterion should be that of nationality, domicile, or territoriality. We cannot here discuss the code in detail. Its merit has been universally recognized and it is safe to say it is the greatest constructive contribution to the thorny subject of conflict of laws since the publication of Story's *Commentaries on the Conflict of Laws*. Its value has since been enhanced by the publication of Dr. Bustamante's treatise—now the premier work on the subject.<sup>47</sup>

To public international law, Latin America's contribution has been no less noteworthy. Devotion to international law was an inheritance from Spain. Spanish jurists, precursors of Grotius, were the founders of modern international law—Vitoria (1480–1546), Suárez (1548–1617), Soto (1494–1570), Arias de Valderas (*fl.* 1533), Ayala (1548–1584). The subject never ceased to hold the interest and attention of Spanish lawyers. It is true that Spain, having attained priority by conquest in the New World, was interested in maintaining the *status quo* and that development of international law seemed helpful to the preservation of her vested rights, but this fact must not blind us to the high Christian ideals that inspired her jurists. A traditional feeling for international law became rooted in her jurisprudence and was transmitted through the colonial era to the new republics. Having sprung from a common source, closely bound in many ways yet faced after independence with perplexing boundary disputes and other international-law problems concerning questions of citizenship, navigation, and land transit, and later, in the course of turbulent days, with claims of foreigners, it was natural that a keen feeling for international law should be maintained. International law was taught in the universities from the earliest days. Not only writers of merit but diplomats of the first rank sprang up in all countries. We can mention only a few: Calvo, Drago,

and Alcorta of the Argentine; Rio Branco, Ruy Barbosa, Pessôa, and Rodrigo Octavio of Brazil; Bello and Edwards of Chile; Tovar of Ecuador; Antonio José Uribe and Pérez Triana of Colombia; Mariscal of Mexico; Maúrtua of Peru; Seijas of Venezuela; and Bustamante, again, of Cuba. Until the twentieth century, Latin Americans had been well-nigh ignored in international conferences. When they were invited to attend, starting with the Second International Peace Conference of 1907 at The Hague, they surprised their European colleagues by their learning, oratory, and ability, and infused a fresh spirit, inspired by practical idealism, into the routine of such conferences. Their keen participation in international affairs has not waned, and, in practice, they have been leading exponents, by treaties, of closer commercial understandings, extradition, international arbitration, and in general of the peaceful settlement of disputes. South America feels a continental solidarity for the cause of peace, and when armed clashes occur between nations (as in the recent Leticia and Chaco affairs), the continent is shocked and the pressure of continental opinion brought to bear.

Latin America has made distinct and valuable contributions to the progress of world law in the fields of mining, comparative and public and private international law. Its contribution to other fields has been small, in part because the work of its eminent jurists and criminologists has passed unnoticed, in part because it is relatively insignificant. In these other fields, it must create truly national laws, not mere copies of other systems, and must solve its own problems, by a thorough and unprejudiced study of local needs and conditions, before it can be expected to add materially to legal science. In these other fields, Latin America's chief value to the student is as an object lesson on the futility of legislation that is not suited to racial and local *mores*.

The impact of modern industry in recent years on a rural,

feudal economy is producing the usual strains and stresses. There is a new ferment in political and social life, different in character from the old struggles of parties and leaders. It is inevitable that the rush to adapt the law to the times should often be led by rash and immature youth, inspired by progressive ideals, imbued with a crusading spirit, zealously aware of the general problems, but insufficiently acquainted either with the processes of the law or with the basic facts of business and industry. Their training in the universities for the most part has been too scholastic, too theoretical, too superficial. The lack of a sense of humor, in other words of a sense of balance, is a striking characteristic and they are suffered by their elders to develop an exaggerated sense of self-importance. The greatest hope for the future is that the ferment has reached the universities and that there is an insistent demand for a thorough overhauling of methods, curricula, and objectives. The froth will subside. Latin America will soon come of age. It is not rash to predict that before the next centennial she will have added many noteworthy contributions to the law.

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#### NOTES

<sup>1</sup> LAWS OF THE INDIES, bk. 4, tit. 7.

<sup>2</sup> The Arab influence is especially strong in the law of waters, in farming leases and partnerships, and in the language of the law. The limited or special partnership, found today in all countries (*sociedad en comandita—société en commandite*), is possibly of Arabic origin, as also the joint venture (*cuenta en participación*) and the bill of exchange. Arabic names for contracts, offices, and institutions are among the common words of Spanish law today, e.g., *alcalde*, *alguacil*, *alcaide*, *almacén*, *almoneda*, *alcabala*, *aduana*, *arancel*, *tarifa*, *ajuar*, *albacea*, and many others; in many instances, the institution or its organization was taken over with the language.

<sup>3</sup> FUERO JUZGO, circa 694.

<sup>4</sup> Wambaugh Book Review; Scott's transl. of *Siete Partidas* (1933) 46 HARV. L. REV. 1054.

<sup>5</sup> One or two writers assert that the origin of the disregard for enacted law was due to

the authority given (first by a royal *cédula* of 1528) to colonial officials to suspend, upon filing a *suplicación* or appeal to the Crown, the application of any royal order in case its application would give rise to notorious scandal or irreparable injury, the formula used being "*obedecer, pero no cumplir*." This phrase, erroneously understood and translated by most historians as "obey but not comply" really means "pay obeisance," "render homage to." Only in later times was its meaning cynically perverted. It was the proper procedure where royal orders arrived not properly authenticated with the seal of the Council of the Indies (LEYES DE INDIAS, bk. 2, tit. 1, laws 23, 39). The ceremony of obeisance to a royal order was an elaborate one. Similarly elaborate was the reception accorded to the Royal Seal on its arrival at a colony.

<sup>6</sup> RECOMPILACIÓN DE LAS LEYES DE INDIAS (1680) (numerous editions).

<sup>7</sup> Many South American writers are extremely pessimistic about the Indian. The following quotation is typical: "The Indian's moral degeneration is such and his desire to be let alone so great that nothing—in case of a social revolution, for example—could be obtained from him that would be of any value. He would aspire only to get drunk and to sleep eternally in the arms of orgy and idleness." VELARDE, *PATOLOGÍA INDIANA* (2d ed. 1933) 59. On the other hand, he has many warm defenders, almost admirers.

<sup>8</sup> "The *Novísima Recopilación*, instead of serving to simplify the law, only embroiled it more. If chaos and anarchy were noted in the old *Recopilación*, anarchy and frightful chaos are noted in the new." 2 PALLARES, *HISTORIA DEL DERECHO MEXICANO* (Mexico 1904) 93.

<sup>9</sup> The earliest *audiencia* established was in Hispaniola (Santo Domingo) by royal *cédula* of October 5, 1511. Extensive ordinances for its governance were issued June 4, 1528, which were substantially like those in force for the chancelleries of Valladolid and Granada. Every detail of hours of attendance and order of business was minutely regulated, with penalties for nonappearance of the judges or of the lawyers, and the minutest details of the clerks' duties, including an order that a clock be installed so that the prescribed hours of court might be duly kept (LAWS OF THE INDIES, bk. 2, tit. 15, 22, law 11). All matters not expressly provided for were to be governed by the laws and *pragmáticas* of Castille in conformity with the LEYES DE TORO (*id.*, bk. 2, tit. 1, law 1). The *audiencia* of New Spain was created by royal *cédula* of December 13, 1527. Other *audiencias* were Cuba (1526), Lima (1542), Guatemala (1543), Guadalajara (1548), Bogotá (1549), Quito (1563), Cuzco, Santiago de Chile (1609), Buenos Aires, and Caracas (1786). There were many curious prohibitions, e.g., suitors were prohibited from conversing with the judges (*oidores*) or *alcaldes* in their houses or accompanying them or their wives (*id.* bk. 2, tit. 16, laws 52, 53). Elaborate codes of ethics were provided for lawyers, under pecuniary penalties as well as suspension or disbarment for violation (*id.* tit. 24).

<sup>10</sup> The same was true in Portugal and Brazil, where lawyers were also exempt from local taxes. For a valuable study of the history of the bar, see GUIMARÃES DE SOUZA, *O ADVOGADO* (Recife, 1935). The Code of Ethics of the American Bar Association has, in substance, been adopted in Brazil. A few notable lawbooks were written by colonial lawyers. The most valuable historically is SOLORZANO, *POLÍTICA INDIANA* (1647), diffuse, but an excellent picture of the law and its workings in the midcolonial days. The Commentaries of Gamboa (1717-1794), of Jalisco, Mexico, the leading lawyer of his era, on Mining Law (1771) are also highly meritorious.

<sup>11</sup> In the preamble to the decree providing for the Argentine code commission, it was



said among other things that the legislation then in force "contains laws passed during a period of time extending over many centuries, unknown to the people on whom they are binding, stored away in court archives or in the private libraries of a few individuals fortunate enough to possess them as priceless curiosities. Society at large and very often juriconsults and the judges themselves are ignorant of their very existence, and consequently the sudden and unexpected application of these laws is as inappropriate as it would be to adjudge matters by rules which have not been duly promulgated."

<sup>12</sup> Andrés Bello (1781-1865), a native of Venezuela, achieved fame as a classical scholar, teacher, and grammarian, as well as a codifier and international jurist. In his youth he had resided in London. He was the first rector of the University of Chile, founded in 1842, published a classic book on International Law (BELLO, PRINCIPIOS DE DERECHO DE GENTES) in 1832 which largely influenced Wheaton, and was arbitrator in international disputes between Ecuador and the United States, and Peru and Colombia. His legal, literary, and cultural influence in Spanish America was great. He was never a practising lawyer.

<sup>13</sup> The state codes have generally followed the federal codes, but there are some minor differences, which have to be watched for. Argentine, Brazil, and Venezuela, which also adopted the federal system, more wisely provided for the passage by the national congress of uniform civil and commercial codes.

<sup>14</sup> The law of community property of matrimonial gains in our Western states and Louisiana is derived in large part, especially as to the make-up of the common fund, from Spanish colonial law [McKAY, COMMUNITY PROPERTY (2d ed. 1910) 3 ff.]. Family ownership is not like any modern form of ownership. The *legitimate* of the modern civil law is the historic successor of ancient family ownership (*id.* at 16, 19).

<sup>15</sup> MEX. CIV. CODE (1884) Art. 3323, ff.

<sup>16</sup> 2 Pallares, *op. cit. supra* note 8, at 124.

<sup>17</sup> E.g., Paraguay, Dec. 2, 1898; Ecuador, Oct. 28, 1902; Peru (see laws on divorce, *infra* n. 18); Chile, Jan. 10, 1884; partially relaxed Law 4808 of Feb. 10, 1930; Bolivia, Law of Oct. 11, 1911; Decree, March 19, 1912, except as to Indians who are subject only to the canonical marriage; Decree, Aug. 31, 1920; Cuba, July 29, 1918; Santo Domingo, Law 1044 of 1928; Salvador, Civ. CODE (1904) 97 ff.; Honduras, Civ. CODE (1906) 94 ff.; Uruguay, Civ. CODE (1893) Art. 81 ff.; Venezuela, Civ. CODE (1916) 64 ff.

<sup>18</sup> E.g., Bolivia, April 15, 1932; COSTA RICA Civ. CODE (1886) Art. 80 ff.; Law 71 of 1932; Cuba, Law 206 of May 10, 1934; Ecuador, Oct. 28, 1902; Oct. 29, 1904; Sept. 30, 1910; Guatemala, Feb. 12, 1894, Civ. CODE (1926) 122 ff.; Haiti, May 10, 1920; HONDURAS Civ. CODE (1906) 140 ff.; Mexico, Law of Family Relations 1917 and Civ. CODE (1928) Art. 266 ff.; Nicaragua, Law of July 28, 1894; Civ. CODE (1904) Art. 160 ff.; PANAMA Civ. CODE (1917) Art. 114 ff.; Peru, Law 6890, Oct. 8, 1930; Law 7282, Aug. 22, 1931; Laws 7893 and 7894, Oct. 8, 1934; Salvador, April 19, 1902, Civ. CODE (1904) Art. 144 ff.; Santo Domingo, June 2, 1897; Law 843 of 1935; July 1, 1899; Uruguay, Oct. 26, 1907; Civ. CODE (1914) Art. 186 ff.; July 11, 1910; Sept. 9, 1913; VENEZUELA Civ. CODE (1916) 188 ff. The only countries where divorce is not now permitted are Colombia, Brazil, the Argentine, and Chile.

<sup>19</sup> SEC DE LA VEGA, CAPACITÉ DE LA FEMME MARIÉE DANS LE DROIT DE L'AMÉRIQUE LATINE (Paris, 1933). Bolivia, Peru, Paraguay, Uruguay (although granting woman suffrage), and Venezuela still maintain the legal incapacity of married women.

<sup>20</sup> E.g., Guatemala, Nov. 30, 1890; PANAMA Civ. CODE (1916); MEX. CIV. CODE

(1928); *Bolivia*, Dec. 27, 1882; *Brazil*, CONST. (1934) Art. 147; *Colombia*, Law 45 of 1936, and see Law 32 of 1936.

<sup>21</sup> *E.g.*, *Chile* CONST. (1925) (the exercise of the right of property is subject to the limitations or rules required by the maintenance and progress of the social system, and for such purpose the law may impose obligations or servitudes of public utility in favor of the general interests of the State, the health of citizens, and public well-being). *Mexico* CONST. (1917) Art. 27 and CIV. CODE, see *infra* note 29. *Peru* CONST., *infra* note 30. *Uruguay* CONST. (1934) Art. 31.

<sup>22</sup> *E.g.*, *Mex.* CIV. CODE, *infra* note 29. *Argentine*, Law 11,627 of 1932 (rural leases). *Uruguay*, Law 8742 of 1931 (arbitration boards to regulate rural leases).

<sup>23</sup> For Workmen's Compensation Acts, see U. S. Dept. of Labor; BULL. OF U. S. BUREAU OF LABOR STATISTICS No. 529 (1930). Illustrative of other laws on social legislation (up to 1935) are:

*Argentina*: Law 4661, Aug. 30, 1905; regulations, July 20, 1911 (Sunday rest). Law 5291, Oct. 14, 1907; regulations, Feb. 20, 1908; Law 11,317 of 1924, regulations, May 28, 1925; Law 11,932 of 1934 (restrictions on woman and child labor). Laws 9148 of 1913, 9661 of 1915, 12,101 and 12,102 of 1934 (employment agencies). Law 10,505 of 1918, regulations, Dec. 30, 1918 (regulating homework). Law 11,544 of 1929; regulations, March 11, 1930, Jan. 16, 1933 (eight-hour day). Law 11,640 of 1932 (Saturday half holiday). Law 11,837 of 1934 (summer closing). Law 11,338 of 1926, decree Jan. 15, 1934 (prohibiting night work in bakeries). Law 9677 of 1915, 11,393 of 1927 (cheap housing). Law 11,110 of 1921 (pension funds). Law 11,933 of 1934 (protection to maternity). Law 10,824 of 1917 (homestead). Law 10,903 of 1919 (custody of infants). *Bolivia*: Law of Nov. 21, 1924; regulations, March 16, 1925 (medical assistance, one month's additional pay a year, if employer has made a profit, discharge benefits). Law of April 18, 1928 (occupational diseases). Decree May 28, 1927 (prevention of accidents). Law of Jan. 25, 1924; Decree July 21, 1924 (obligatory savings). Decree July 7, 1928 (laborers' insurance).

*Brazil*: Jan. 5, 1921; May 22, 1922; Nov. 26, 1923 [protection of abandoned minors and the CONST. (1934) Art. 115 ff.].

*Colombia*: Law 78 of 1919 (legalizing and regulating strikes). Law 21 of 1920 (arbitration of labor disputes). Law 83 of 1931 (labor unions). Laws 37 of 1921, 32 of 1922, 44 of 1929, 133 of 1931 (obligatory insurance). Decree 800, May 4, 1932 (regulations). Law 83 of 1923, 73 of 1927 (Labor Bureau). Law 15 of 1925 (factory hygiene). Law 48 of 1924, 9 of 1930 (protection to children and regulation of child labor). Law 57 of 1926, 72 of 1931 (Sunday rest). Decree 1278 of July 23, 1931 (regulations). Law 10 of 1934 (clerks' contracts and compensation on discharge). Law 8 of 1935 (employees' contracts and discharge benefits). Laws 70 of 1931, 91 of 1936 (homesteads). Law 66 of 1936 (obligatory employees' savings).

*Cuba*: Law of May 18, 1922; Decree 2302 of 1925 (regulating female labor and providing for employment of at least 50 per cent of female labor in certain classes of shops). Law June 2, 1928 (prohibiting night work in bakeries). For the recent extensive social legislation, see report accompanying Code of Social Defence (3d ed. Havana, 1936), 38 ff.

*Ecuador*: 1921, 1927 (restricting employment of women under 18 and providing for protection of maternity).

*Mexico*: CONST. (1917) Art. 123 (eight-hour day; prohibition of night work for

women and children; Sunday rest; share in profits, right to strike; three months' discharge payment).

*Panama:* Law 23 of 1930 (protection to maternity). Law 56 of 1930 (venereal contagion a crime). Law 29 of 1930 (workmen's health protection).

*Peru:* Law 3010, Dec. 20, 1918 (compulsory day of rest). Law 2851, Nov. 25, 1918; Law 4339, March 26, 1921 (woman and child labor). Law 2285, Oct. 16, 1916 (regulation of Indian labor). Law 4916, Feb. 7, 1924; 5066, March 5, 1925; Law 5119, June 15, 1925; Law 6871, May 2, 1930 (clerks' insurance and compensation on discharge, and providing for special labor judges). *Cf.* the conservative law 7166, May 28, 1931, whereunder every declaration of a strike automatically suspends constitutional guaranties.

*Uruguay:* Dec. 21, 1934 (old-age pensions). Law 8797 of 1931, regulations Jan. 14, 1932 (Saturday half holiday).

The recommendations and conventions of the International Labor Organization of Geneva have been adopted by many Latin American countries. A Chilean jurist, Poblete Troncoso, has taken a very prominent part in this organization. Cuba very recently (Jan. 1936) has adopted three of these conventions on minimum wages, hours of work, and minimum wage for child laborers.

<sup>24</sup> "In its long preparation, in the fact that leading jurists of the country took part in its discussion and elaboration, in the minuteness with which every provision was examined, may be found the explanation for the excellence of the Code. While not so monumental in the evolution of law as the enactment of the French, Italian, or German civil codes, it is nevertheless a remarkable work of codification." BORCHARD, GUIDE TO THE LAW AND LEGAL LITERATURE OF ARGENTINE, BRAZIL AND CHILE (1917) 244.

<sup>25</sup> The former general rule that ignorance of the law does not excuse noncompliance is repeated, but it is added, however, that the judges, in view of the notorious intellectual backwardness of some persons, their remoteness from means of communication, or their pitiable economic situation, may, if the attorney general agree, exempt them from the penalties they may have incurred by failure to comply with a law of which they were ignorant, or, if feasible, may grant them time within which to comply—always provided laws directly affecting the public interest are not involved (MEX. CODE ART. 21).

<sup>26</sup> Article 27 of the Constitution of 1917 provided, *inter alia*: "The Nation shall have the right at any time to impose such limitations on private property as the public interest may require." The fundamental principle laid down in the Code is "The inhabitants of the Federal District and Territories are obligated to carry on their activities and to use and dispose of their property in such manner as not to injure society (*la colectividad*)" (MEX. CODE ART. 16). Numerous later articles contain frequent detailed applications of this principle.

<sup>27</sup> The Constitution provides: Local laws (*i.e.*, state laws) shall organize the homestead, determining the property which shall constitute it, on the basis that it shall be inalienable and not subject to any attachment or encumbrance whatsoever (CONSR. ART. 27 *ff.*). Tit. Six, Art. 123, par. 28, repeats this provision, for national law, and adds that the homestead shall be transmissible by inheritance under a simplification of the formalities of the ordinary succession proceedings.

<sup>28</sup> Whenever any person exploits the ignorance, notorious lack of experience, or poverty of another and makes an excessive profit manifestly disproportionate to the obligations he himself incurs, the injured party is entitled, within one year, to demand rescission of the contract or, if that be impossible, an equitable reduction of his obligation (CODE ART. 17).

<sup>29</sup> A few miscellaneous provisions of special interest may be noted. In nearly all cases, a curator (watchman or supervisor) of guardians is to be appointed, thus answering the question *quis custodiet ipsos custodes* (*id.* Art. 618 ff.), and special Local Boards of Guardians and Courts of Wards are set up (*id.* Art. 631 ff.). Detailed provisions for estates of missing persons are elaborated; the time for a decree of presumption of death is shortened from fifteen to six years, and in extraordinary cases, such as shipwreck, explosion, earthquake, and the like, to two (*id.* Arts. 648 ff., 705). Rural property not cultivated for ten years or city property in bad condition unoccupied for a like period are decreed abandoned and subject to expropriation (*id.* Arts. 771, 772). A brave attempt is made to restate the thorny subject of possession, but this writer cannot see that much gain in clarification has resulted (*id.* Art. 790 ff.). The doctrine of market overt is introduced (*id.* Arts. 799, 800). The concepts of public use for which private property may be taken upon compensation are greatly enlarged, including, as examples, for homesteads, for construction of houses for the poor, or for any works of evident collective benefit (*id.* Art. 836); objects of national art and archeology may be taken, and present owners may not sell or mortgage without government authority (*id.* Art. 835). It is declared to be the duty of an owner to exercise his rights of property for the social benefit (*id.* Art. 810) and private property is subject to limitations imposed not only by statute but by executive regulations (*id.* Arts. 810, 817). The common law of nuisances seems to have influenced Arts. 837 ff.; the older Latin American codes were generally defective on this score. Spite fences and similar malicious erections are made illegal under the broad provisions of Art. 840. (It is not lawful to exercise the right of property in such manner that the exercise thereof has no result other than to cause damage to a third party, without utility to the owner.) Rules as to lights, windows, balconies, roofs, etc., all new, are laid down (*id.* Art. 849 ff.). A right, not formerly possessed, is given to wage-earners and crop-sharers to hunt on the estates where they work (*id.* Art. 857). Some substantial modifications are made in the law of waters (*id.* Art. 933 ff., 1071 ff.), and the law of easements is modernized in several particulars, e.g., a compulsory right of way for private telephones and electrical power is given (*id.* Art. 1108). The terms for prescription to acquire ownership are shortened, and the former requirements (in addition to possession under claim of ownership) of "foundation on a just title" and "in good faith" are abolished (*id.* Art. 1151 ff.); the intent, of course, is to enable squatters to obtain title and to clear titles more readily. The entire topic of copyright is revised and liberalized (*id.* Art. 1182 ff.); the government may republish works of public interest when the author fails to do so (*id.* Art. 1240). The law of inheritance is amended so as to include among those entitled to support a woman with whom the testator lived for five years or by whom he has had children (*id.* Art. 1368), and gives her and illegitimate children rights in intestate succession (*id.* Arts. 1602, 1607), a recognition of the plain facts of Mexican social life and customs, which the old law unjustly ignored. The code treats a concubine practically as a wife, but if there have been more than one concubine, none inherits. *Caveat concubina*. The distribution of estates is speeded (*id.* Arts. 1707, 1712, 1737, ff.). A chapter on holographic wills (*id.* Art. 1550 ff.) is new and evidences the intention to permit a simpler and less costly method of executing wills than formerly by filing a duplicate, with the testator's fingerprints, in the Registry office. As to the general rules of the law of contracts, there are not many fundamental changes, but the whole subject is treated more scientifically and modernistically. Many contracts formerly requiring the formality of the expensive public notarial instrument may now be executed as private instruments. Rules as to offers and acceptances by telephone and telegraph are

provided (*id.* Arts. 1805, 1811). Mistakes of law are treated on the same footing as mistakes of fact, invalidating a contract (*id.* Art. 1813). A chapter (*id.* Art. 1860 *ff.*) on unilateral declarations of intention is new; it deals chiefly with offers to the public and lays down stricter rules of liability than our own courts enforce. The chapter (*id.* Art. 188: *ff.*) on unjust enrichment is new, and adequately covers the subject; the old code was notoriously deficient on the subjects of quasi-contracts and torts. A novel solution is given to the question: Can one who has paid money to another in prosecution of an illicit purpose or one contrary to good morals recover it? The answer is: The recipient cannot keep it, but must give back one-half to public charity, one-half to the payer (*id.* Art. 1895). To the eyes of the common-law lawyer, the new code, though an improvement on the old, is still inadequate on the subject of torts (*id.* Art. 1910 *ff.*). The chapter on risks of employment (*id.* Art. 1935) is new and in line with modern labor tendencies, casting liability on the master for accidents and occupational diseases, regardless of fault, and discarding the theory of assumption of risks by the servant. The title on preparatory contracts-promises (*id.* Art. 2243 *ff.*) contains useful innovations. While the code does not go so far as to enact our principle that equity shall deem as done what should have been done, the courts are in effect given what we would call the equitable power to compel parties to execute a contract, deed, etc. Under the old law there was no such power and the drafting of a valid option agreement, for instance, always presented some problems to the practising lawyer; unfortunately, these are not completely eliminated. Conditional installment sales are now permitted, subject to recording and with provisions to protect the buyer against unfair treatment (*id.* Art. 2310 *ff.*). The land-registry system is altered; a cash sale and transfer of ownership of realty not exceeding five thousand pesos in value can be made by endorsement in the presence of the Registrar of the Registrar's certificate of title (*id.* Art. 2321). No usury provisions are enacted, but if the rate be so high as to furnish grounds to believe that the debtor's financial difficulties, inexperience, or ignorance have been taken advantage of, the court may make an equitable reduction in the rate to not less than the legal rate—nine per cent (*id.* Art. 2395), and where a higher rate than the legal rate is stipulated, the debtor is given the right to repay principal and interest regardless of the term (*id.* Art. 2396). Anticipatory provisions for compound interest are void (*id.* Art. 2397). Innovations to favor the tenant are made in the law on leases (*id.* Art. 2398 *ff.*); a tenant of more than five years' standing who has made improvements is given preferential rights to a new lease or to purchase (*id.* Art. 2447); the tenant's former strict liability for fire is relaxed (*id.* Art. 2437). The landlord's liability to the tenant for failure to comply with orders of the Health Department cannot be waived (*id.* Arts. 2449, 2551). A striking limitation on absolute ownership is imposed by Arts. 2453 and 2751; the owner of farm lands must cultivate them; if he fail to do so, he is under obligation to lease it outright or on shares. Provisions in favor of tenant farmers abound; they are entitled, if half or more of the crop is lost by extraordinary fortuitous events, to a reduction of the rental (*id.* Art. 2455). A tenant not in arrears is given the absolute right of renewal for one year unless the landlord personally desires to inhabit the house or cultivate the farm (*id.* Art. 2485), subject in certain cases to an increase of ten per cent in the rental. The tenant may rescind a lease if the landlord without just cause refuses to consent to sublet when the tenant is entitled so to do (*id.* Art. 2492). Legislation to carry out the revolutionary provisions of Article 123 of the CONSTITUTION has not yet been enacted and the code leaves the knotty question of labor contracts unsolved. The provisions of the old code,

in so far as not inconsistent with Articles 4, 5, and 123 of the CONSTITUTION, are left unchanged pending later legislation (*id.* Art. 2605 ff.). Where professional men are organized in a trade union, compensation is to be determined not by individual agreement but by the collective labor contract (*id.* Art. 2606). Farming on shares is made more equitable for the cropper (*id.* Art. 2739 ff.); the cropper's share may not be less than forty per cent (*id.* Art. 2741); the lease cannot be terminated by the death of the landlord, but only on the death of the tenant, subject to payment to the heirs for work done (*id.* Art. 2742); certain penal damages formerly imposed on the tenant are mitigated (*id.* Art. 2745). The landlord has no lien and cannot take off the crop unless the tenant fail to do so (*id.* Arts. 2746, 2747). If the crop is totally or partially lost, the tenant is exempted from liability to pay for the seed, totally or proportionally (*id.* Art. 2748). The tenant is entitled to erect a house, to take necessary fuel and water, to graze his farm animals (*id.* Art. 2749), and, if not in default, to a preëemptive right to renewal (*id.* Art. 2750). A right of action is given to recover money lost at gambling, fifty per cent going to the plaintiff, fifty per cent to public charity (*id.* Art. 2765). The code tends to abolish the distinctions between the laws of pledges and of mortgages (*id.* Art. 2856 ff.). The law as to priority of payments between different classes of creditors is materially altered (*id.* Art. 2980 ff.); *inter alia*, tort creditors, formerly ranking last, now either are given priority if laborers (*id.* Art. 2989) or rank *pro rata* with general creditors. Radical changes regarding the Public Registry are made (*id.* Art. 2999 ff.). The list of documents subject to recording is greatly enlarged (*id.* Art. 3002), and private instruments duly authenticated may be recorded (*id.* Art. 3011). In the case of real estate, maps must be filed and more detailed information is now required (*id.* Art. 3012 ff.). Provisional entries, pending final court determination or further formal action (*anotación preventiva*), long familiar in other civil-law countries, are now for the first time provided by "blotter" entries (*id.* Art. 3014 ff.). Chapters (*id.* Arts. 3023, 3024) on registry of information regarding ownership and registry of possession are entirely new and project a method for improving real-estate titles or possession held by prescription.

<sup>30</sup> As illustrative of the recent tendencies, we may cite some provisions of the Peruvian CONSTITUTION of 1933. The State recognizes freedom of association and of contract, but the conditions for the exercise of such freedom are regulated by the law (*id.* Art. 27), and the law shall establish the maximum interest for loans of money. Any agreement to the contrary is void. Those who contravene this precept shall be punished (*id.* Art. 28). The State recognizes liberty of commerce and industry, but statutes may establish limitations or restrictions when required for public security or necessity (*id.* Art. 40). Liberty of labor and of the professions is also guaranteed (*id.* Art. 42), but legislation shall provide for collective labor agreements (*id.* Art. 43) and provisions in labor contracts restricting the exercise of civil, political, and social rights are prohibited (*id.* Art. 44). While property rights are declared inviolable and property may not be taken except for a public use and after fair valuation and compensation (*id.* Art. 29), nevertheless property must be used in harmony with the interests of society. The law shall determine the limits and conditions (*modalidades*) of the right of property (*id.* Art. 34) and the law may, for reasons of national interest, establish special restrictions and prohibitions for the acquisition and transfer of specified classes of property, either on account of their nature, condition, or geographical situation. The State may upon compensation take over all transportation facilities (*id.* Art. 38). The State shall favor a regime of participation by laborers and employees in the profits of enterprises

and shall legislate as to the relations between employers and employees and for the protection of employees and laborers in general (*id.* Art. 45). The State shall legislate on the general organization and security of industrial labor and the security therein of life, health, and hygiene. The law shall determine the maximum hours of labor, payment for services rendered and for accidents, and also minimum wages in relation to age, sex, the nature of the work, and the conditions and needs of the different regions of the country (*id.* Art. 46). The State shall favor the conservation and diffusion of medium and small rural holdings and may by statute, upon compensation, expropriate privately owned lands, especially those not worked, for subdivision or distribution on such terms as the law may determine (*id.* Art. 47). The law shall establish a regime of prevision against the economic consequences of unemployment, old age, sickness, infirmity, and death, and shall foster institutions of social solidarity, savings and insurance, and coöperative associations (*id.* Art. 48). Measures may be enacted by the legislature or by the president under legislative authority, when extraordinary circumstances require, tending to reduce the cost of living (*id.* Art. 49). It is the duty of the State to care for public sanitation and private health and to enact statutes for hygienic and sanitary control, as well as those favoring the physical, moral, and social improvement of the population (*id.* Art. 50). Marriage, the family, and maternity are under the protection of the law (*id.* Art. 51). The defense of the physical, mental, and moral welfare of children is a primordial duty of the State. The State shall defend the right of the child to home life, education, vocational guidance, and to ample support when it is in a situation of abandonment, illness, or misfortune. The State shall entrust the performance of the provisions of this article to adequate technical organs (*id.* Art. 52). The technical direction of education is vested in the State (*id.* Art. 71), primary instruction is free and obligatory (*id.* Art. 72), and there shall be at least one school in every place where the scholastic population reaches thirty (*id.* Art. 73). Schools in industrial, agricultural, or mining centers shall be maintained by the respective owners or enterprises (*id.* Art. 74). The State shall foster secondary and university education, with a tendency to secure free instruction (*id.* Art. 75). In every department there shall be a school for industrial guidance (*id.* Art. 76), and the State shall foster the technical education of laborers (*id.* Art. 77), and foster and contribute to the support of kindergartens and postscholastic education and schools for retarded and abnormal children (*id.* Art. 78). The moral and civic education of the child is obligatory and shall necessarily be inspired by the aggrandizement of the nation and the solidarity of man (*id.* Art. 79). Liberty of teaching is guaranteed (*id.* Art. 80). There shall be a National Economic Council composed of representatives of consumers, capital, labor, and the liberal professions. Its organization and duties shall be determined by statute (*id.* Art. 182). Recent nationalistic tendencies are manifested in the provisions that in all public contracts with or concessions to foreigners there must be an express submission to the laws and courts of Peru and waiver of diplomatic claims (*id.* Art. 17 and see Arts. 31, 32); aliens are prohibited from owning land, mines, or waters, directly or indirectly, within fifty kilometers of the frontier (*id.* Art. 36); mines, lands, forests, waters, and generally all natural resources belong to the State, saving vested rights (*id.* Art. 37); freights and fares shall be fixed and collected only in natural currency (*id.* Art. 39). In this constitution, as well as in the new Brazilian CONSTITUTION (1934), especially Art 115 *ff.* and the Uruguay CONSTITUTION (1934) Art. 48 *ff.*, the direct influence of the Mexican and Spanish constitutions and the indirect influence of Soviet Russia are manifest. On the other hand, the influence of

American constitutional law is evident in the provisions (*id.* Arts. 69, 133) that all individual and social rights recognized by the constitution give rise to the action of *habeas corpus* and that there is an action maintainable by any citizen (*acción popular*) in the courts against regulations, resolutions, and decrees of a general character which violate the constitution or the laws, the proper judicial procedure therefor to be established by statute. Many of the constitutional guaranties may, however, be suspended by the executive when required for the security of the State (*id.* Art. 70). The writ of *habeas corpus*, and its Mexican and Central American counterpart, *amparo*, have been generally extended in Latin America to the protection of all constitutional rights. The American doctrine of the power of the courts to declare statutes unconstitutional has, under one form or another, been adopted by most Latin American countries. The Argentine CONSTITUTION (1860) and the Brazilian (1891) were modeled on that of the United States. The power, generally vested in the Supreme Court, is given by the constitutions expressly as follows: Bolivia (1880) Art. 111; Brazil (1891) Art. 59, 1, b; 60 (1934) 76, III, 81; 91, IV; 96; 179; Chile (1925) Art. 86; Colombia, AMEND. 3 (1910) Art. 41; Costa Rica, Art. 17; ORGANIC COURTS LAW (1887) Art. 8; Cuba (1901) Art. 83, par. 4; law March 31, 1903; Guatemala (1879 and 1927) Arts. 34, 85; Haiti (1918 and 1928) Art. 99; Honduras (1924) Arts. 102, 135; Mexico (1917) Arts. 103, 105, 107; Nicaragua (1911) Arts. 122, 124; Peru (1933) *semble* Art. 69; Salvador (1886) Art. 37; Uruguay (1934) Art. 232 *ff.*; Venezuela (1931) Art. 34, 120 par. 9. In Ecuador, power to pass on constitutionality of laws is expressly and exclusively vested in the congress, but bills may be referred to the supreme court and its decision on their constitutionality is final (CONST. Art. 163).

<sup>31</sup> Haiti, 1826; Bolivia, 1834; Santo Domingo, 1845.

<sup>32</sup> Bolivia, 1834; Paraguay, 1834; Costa Rica, 1850; Peru, 1853; Colombia, 1853; Salvador, 1855.

Of the Spanish Code of 1829, Pardessus wrote shortly after: "At the risk of displeasing those who like to depict Spain as plunged into barbarism, we would say that it is superior to all previous codes. Even if its draftsmen had done nothing more than profit by the codes of other nations, we must render homage to their wisdom; but they have done better and consequently we must render homage to their scientific spirit. In spite of an occasionally diffuse and prolix redaction, it is far superior to our 1807 code: it is more methodically arranged and has not so many lacunae." DESJARDINS, INTRODUCTION HISTORIQUE À L'ÉTUDE DU DROIT COMMERCIAL MARITIME (1890) 395.

<sup>33</sup> Argentine, 1859-1862, 1889; Chile, 1867; Mexico, 1884, 1889, and others based on these.

The first Argentine code (1859-1862), drafted by Vélez Sarsfield and Acevedo, a Uruguayan, was based principally on the Brazilian code; the Uruguayan (1866) on this Argentine code. The Panama code (1869), adopted by Colombia (1887), the Guatemala (1877), Honduras (1880), and Salvador (1882) codes, were based chiefly on the Chilean, which in turn was based on the French and Spanish codes. In Guatemala, by a law of 1839, it was provided that the Spanish Code of 1829 should be cited as authoritative doctrine. Mexico's first code (1884) was promulgated hastily, subjected to severe criticism, and replaced in 1889. A code issued in 1854 was repealed the following year in an outbreak of violent reaction against all the measures promulgated by the dictator, Santa Ana. The Venezuelan Code of 1863 was based principally on the French, that of 1873 introduced elements also from the Italian Code of 1865 and the commercial laws



of England and Germany, and the 1904 code from the Italian CODE OF 1882 and the German CODE OF 1900. Paraguay in 1903 adopted in its entirety the Argentine CODE OF 1889, which in practice had been applied since that year. Ecuador (1878-1882) utilized chiefly the Venezuelan (1873) and French law.

<sup>34</sup> The Spanish code, with later amendments, is in force in Cuba, Porto Rico, and the Philippines. It was closely followed by Peru (1902). The Salvador code (1904) is based on the Spanish code of 1885 and the codes of Chile, Italy (1882), and, principally, Portugal. Ecuador (1906) followed chiefly the Belgian code. Some other codes are derived from an infinity of sources, not well harmonized.

<sup>35</sup> Law 52 of 1917.

<sup>36</sup> Law 46 of 1923.

<sup>37</sup> Law 9 of 1925.

<sup>38</sup> LAW OF CREDIT INSTITUTIONS.

<sup>39</sup> August 26, 1932 c. v.

<sup>40</sup> E.g., Brazil, Law 5746 of December 9, 1929, Chile, Law 1297 of June 23, 1931, which provides *inter alia* for a government bankruptcy bureau to administer all bankruptcies; Peru, Law 7566 of August 2, 1932, Argentina Law 11,719 of September 27, 1933, receivers appointed from a list of certified public accountants.

<sup>41</sup> A well-authenticated case was recently reported to the author. A doctor in a hospital was telephoned to call with an ambulance to receive the body of a prisoner who had been shot attempting to escape. On arriving at the prison, he was shown into an anteroom, told to wait, soon heard a few shots, and shortly afterwards received the corpse.

<sup>42</sup> Argentine, 1922; Peru, 1924.

<sup>43</sup> E.g., Brazil, Oct. 8, 1823 (for offenses of the press); CONST. OF 1824, Arts. 151, 152 (never carried out as to civil cases); PENAL CODE OF 1830; CODE OF CRIM. PRO. 1832; CONST. OF 1891, Art. 72, § 31; Ecuador (jury of six); Uruguay (jury of 6; 12 on appeal); Paraguay (12, with two alternates, presided over by a lawyer chosen for four years); Colombia, Law 57 of 1887, *am'd* Law 1 of 1923 (jury of five). In Santo Domingo, the jury system was tried in 1857, but discontinued in 1858; the 1884 code continued provisions for a jury, but the institution does not exist. The provisions in the ARGENTINE CONSTITUTION (1860), Art. 102, were never carried out. For the history of the Latin American penal codes, see Thot, *O Código Criminal Brasileiro de 1830* (1930) 8 PANDECTAS BRASILEIRAS pt. 1, 119, and 7 RIVAS, DERECHO PENAL (Santiago de Chile, 1935).

<sup>44</sup> E.g., Peru (1912); Chile (1902); Ecuador (1869).

<sup>45</sup> LEYES DE TORO, law 1.

<sup>46</sup> The SIETE PARTIDAS contained rules for the application of foreign law (Part 1, tit. 1, Law 15; Part 3, tit. 14, Law 15).

<sup>47</sup> DERECHO INTERNACIONAL PRIVADO (Havana, 1931), 3 volumes.

## ONE HUNDRED YEARS OF GERMAN LAW

WALTER SIMONS

THERE will be found few peoples of European civilization whose law, during the last hundred years, has undergone so many changes in every direction, and those of so fundamental a character, as that of the German people. Not even the Italians, who took in their development of public law a somewhat parallel course from utter disintegration to unification, can show a similar progress in private law, because with them the bases of this law were not at all equally divergent and contradictory. In order to understand the rather dramatic history of German law during the century between 1836 and 1936, it seems necessary to begin with a review of the vicissitudes of the political situation of the German nation and then to proceed to a short survey of the evolution of the different branches of law.

In 1836, the German people were left without political unity. Napoleon had smashed the medieval *Reich*, the "Holy Roman Empire of the German Nation," to pieces. There existed, indeed, a "German Confederation," built up, after the Napoleonic Wars, by the Vienna Congress of 1815, but this Confederation consisted of half a hundred so-called sovereign states, some of them, like Austria and Prussia, great European powers; some, like Bavaria and Saxony, smaller and less mighty, but of real independence; the rest too small and weak to be worthy of the august name of "State" but by their combined obstruction able to hinder every move toward political progress. Germany, as a whole, was an agrarian country, to a great extent exporting cereals; industrial life was just beginning, stimulated by the mercantilistic ideas of the autocratic regime and by the afflux of foreign, espe-

cially of British, capital into the bloodless veins of the exhausted economic body. The political system of the confederated states showed the most startling differences; few of the rulers, like Goethe's friend, the Duke of Weimar, granted to their peoples a constitution providing for representation in acknowledgment of their sacrifices during the "wars of liberty" against Napoleon. In the famous old towns of the Hansa an old-fashioned system of republican self-government prevailed, while the majority of the monarchs of the other German states clung tenaciously to the autocratic power vindicated, during the seventeenth and eighteenth centuries, against the feudal *Stände* of their countries.

As a rule, every state, even every province and district, had its own public and private law, founded mostly on old custom and tradition. Some of the major states, under the reign of enlightened sovereigns, had tried to unify the multifarious laws of their territories by codification; so did the Elector of Bavaria in promulgating his *Codex Maximilianeus*, the Empress Maria Theresa of Austria by issuing her "Common Civil Code," King Frederick the Great of Prussia by preparing for his provinces the *Allgemeine Preussische Landrecht*. But even these codifications were far from really unifying the law of the countries concerned; in many respects they remained subsidiary to provincial or local law. For the territories without codification, the Roman law received in the period of transition from medieval to modern times and mixed with rules of German origin (*usus modernus Pandectarum*) was prevalent. When I was a judge in Thuringia I realized what a medley of rules this system had led to; within the jurisdiction of my *Landgericht*, containing not quite a hundred thousand subjects, there were in force not less than thirteen systems of dealing with the respective property of married persons, and when I had to decide a case concerning the alleged right to fish in a millrace I did not find a valid written law in my

district until I went far back in legal history to an ordinance of Emperor Frederick II of Hohenstaufen *de regalibus*, dated 1216 A.D. There was, in my district, no case law ruling the matter.

An important difference regarding the validity of codified law existed in all the territories where, at the beginning of the nineteenth century, the *Code Civil Français* had been forcibly imposed by its author, Napoleon. Here the new law was not subsidiary to local customs and rules, but cogent and self-sustained; otherwise it would have been impossible to substitute the firm legal order demanded by the rational mind of the great Corsican conqueror for the fearful promiscuity of laws produced by the innumerable petty principalities, ecclesiastical and secular, and by the many free cities of western Germany. The Napoleonic codes were imposed not only in all the German territories situated on the left bank of the Rhine, but they were, with slight modifications, likewise promulgated on the right bank in the Grand Duchies of Baden and Hesse-Darmstadt and in the old Duchy of Berg and parts of Westphalia, once ruled by "jolly King" Jerome, youngest brother of Napoleon. These codes, introducing into German law the procedure of assizes with a jury, soon became very popular with the inhabitants; reminding them of old German forms of trial, the jury system, as against an autocratic and inquisitive form of juridical procedure, seemed to them a guarantee of civic liberty. The combination of juridical and political antagonism between the different systems of German law accelerated, a hundred years ago, the dismemberment of the old German Reich.

At this time, due to technical progress, a legal progress also began to be visible. At the end of 1835 the first railway was built in Germany, joining the city of Nuremberg to the near-by city of Fürth in Bavaria. During the next years, similar short railways were constructed in Saxony and Prussia. As early as 1838 a Prus-

sian railway order was issued, determining the legal status and especially the responsibility of railway entrepreneurs for casualties on their lines—an order whose principal provisions have been incorporated into the existing law (*Reichshaftpflichtgesetz*). But the influence on law of the new means of transportation was of wider scope: the internal frontiers of German public and private law began to vanish when regularly crossed by railway trains. When the railways gave rise to a densification of commerce and an industrialization of the country, it seemed impossible to sustain those hundreds of tariffs between the German sovereign states. Therefore, Prussia contrived to unite some of the German states in a customs union (*Zollverein*). Beginning by abolishing the customs barriers existing between the different parts of the kingdom itself, she found one after another of the neighboring States willing to join her system, which was characterized by free-trade principles, until—shortly after the year 1836—the greater part of Germany, with the exception of German Austria and the Hanseatic free cities, was included in the union. By these means Prussia paved the way not only for her preponderance in Germany but likewise for a common parliamentary constitution for the members of the union (*Zollparlament*).

Nevertheless, on all questions of foreign policy Germany remained, during the first thirty years of our period, a “geographical notion”; the German people wanted a head in whose resolutions its will would have been concentrated. The stronger members of the Confederation followed very different and, on many occasions, even contradictory political aims. To get a decision of the Federal Diet at Frankfurt on the Main, the *Bundestag*, unanimity of opinion of the sovereign states was necessary, as it is now in the matters laid before the Council of the League of Nations. Bismarck, who was, for some years, Prussian dele-

gate to the Diet, has told posterity, through his brilliant reports and letters written at that time, how every legislative and political step was hampered by endless and numberless frictions and intrigues prevailing in that august and inefficacious body.

In 1866 Bismarck, as Prussian prime minister and leader of foreign affairs, denounced the "eternal German Confederation," proposed to the German states a new constitutional union based on the principle of majority vote, and tried to win liberal public opinion by introducing a German parliament elected through manhood suffrage. This radical and courageous step led to the war between Prussia and Austria. Although all the bigger states of Germany and many of the smaller ones fought on Austria's side, Von Moltke's military genius won what was in reality not a war between independent powers but a civil war of the German nation. As a result, Austria was driven out of the Confederation, the territories of some of her allies were incorporated into the Prussian kingdom, and the rest consented to a new constitution drafted along the lines Bismarck had sketched out before the war. The new union of German states differed from the old Confederation in the same way as the American Union of 1787 differed from the Confederation of 1776; the sovereignty of the individual states was impaired in favor of the union, but it remained intact wherever there was no express constitutional rule to the contrary. The only states left out of the union (besides Austria) were the three states of southern Germany: Bavaria, Württemberg, and Baden. Bismarck expected that by forcing Bavaria and Württemberg into the union he would bring the French Emperor, Napoleon III, to a warlike intervention; therefore he abstained even from accepting Baden's proposal to join. On the other hand, he concluded, with those three states, treaties of neutral coöperation after the pattern of normal international law. As a consequence, Germany was divided into three parts:

German Austria, forming with the Hungarian and Slavic territories the Hapsburg "Dual Monarchy," under a very complicated pseudo-parliamentary rule whereby the influence of the German population was more than balanced by that of the Magyars and Slavs; the states of southern Germany, attached to the others by treaties of a federal character; and the North German Confederation, firmly and legally constituted under Prussian leadership. When France, following the Prussian victories in the civil war of 1866, declared war on King William I in 1870 and lost it in 1871, all the German states fought at the side of Prussia, and the King of Bavaria himself offered to King William the imperial crown of Germany. The North German constitution was extended, with some modifications and reservations, to southern Germany; the much deplored *Mein-line* splitting the German people and territory into unequal parts was bridged by law, not by force, and the new "Constitution of the German Reich" vested the whole authority respecting foreign affairs in the kaiser.

But the kaiser was not sovereign of Germany; sovereignty remained with the states and their representative body, the Union Council (*Bundesrat*). In matters of home policy and common administration given to the competency of the Reich by some article of the constitution, this body decided by a majority of votes, which were distributed among the states in accordance with their population (that is to say, more like the House of Representatives than like the Senate under the American Constitution); but as soon as a dispute about a question not settled by the constitution arose between two states, Germany lacked a tribunal to decide it. The Union Council, like the old council of the Confederation before 1866, was entitled to act only as a mediator. Even more difficult were cases pending between the Reich and a single state that assumed a right the authorities of

the Reich claimed for the union. I remember having collaborated, as a judicial adviser to the foreign office, in such a case pending between the Reich and the Kingdom of Saxony when Saxony, as territorial sovereign, had made a treaty with Austria concerning an exchange of some pieces of land on the common frontier line. The Reich held that this treaty, under the Constitution, was inoperative without its previous consent since it concerned a matter of foreign policy. The case was discussed but not solved by the Union Council; the discussion resulted in advice about a form of procedure in future cases of a similar sort, letting the gap in constitutional jurisdiction subsist.

After the downfall of the empire in 1918, the National Assembly at Weimar tried to fill that gap by the new constitution of the Reich promulgated August 2, 1919. During the preparatory work of the ministerial and parliamentary committees, there was strife between those who wished to centralize all State authority and sovereignty in the Reich and the champions of the traditional rights appertaining until then to the single states. The end was a compromise; the new constitution gave ampler powers to the central authorities of the Reich, but it left some of the original competencies to the single political components of the union, now to be called not *States* but Lands (*Länder*). It even prescribed to the Lands the fundamental rules of their own constitutions: they had to model them after the pattern given at Weimar, *i. e.*, on the basis of a democratic parliamentary system, with a universal equal and secret suffrage including male and female citizens above twenty years of age, and with a proportional representation of the party voters.

Until 1919, there existed in Germany a medley of state constitutions, ranging from the liberal and democratic ones over the strikingly capitalistic class, represented by that of Prussia, to those preserving the feudal status, like that of the duchies of



Mecklenburg. It is easy to conceive that such disparities would give rise to many differences among states; they were wiped out by the Weimar constitution. But the remnants of sovereignty left under it to the *Länder* were apt to cause new disputes; likewise, a quarrel between the authorities of a Land and those of the Reich was nowise out of the question, especially since many *Länder* proclaimed their "statehood" (*Staatlichkeit*) and officially called themselves "free states." To settle such disputes, the Weimar constitution provided for a constitutional court of the German Reich (*Staatsgerichtshof für das Deutsche Reich*), whose chief justice I was for seven years. This Court did much to stabilize the new constitutional law of Germany, but it was used too often by quarrelsome and stubborn politicians and bureaucrats in order to settle, under cover of a lawsuit, disputes of a purely political or economic order. There was some analogy between the function of the Constitutional Court of Germany and certain activities of the Supreme Court of the United States. Unhappily, the German court was not in existence long enough to gain that authority whereof the American Supreme Court can boast, thanks to the work done by great judges during more than a century. So it came to pass that more than once a state party did not abide by the decision of the German court. On one occasion, in a case where some states claimed rights in the administration of the federal railway system, the Reich anticipated such a decision. In order to protest against such a contempt of court, and getting no redress from the president of the Reich, I resigned my office as Chief Justice of Germany in 1929. After that a political dispute of fundamental importance, fought out between the Reich and its mightiest Land, Prussia, before the Constitutional Court and decided in favor of Prussia, has done much to undermine the Weimar system and to bring National Socialism into power.

At present the Weimar constitution is, as a matter of fact, wiped out by the Hitler regime, although it has not been formally and totally repealed by law. The parliamentary system is dead, not only in the Reich but likewise in the different Lands; the new constitutional bodies—the Diet of the Reich and the State Council of Prussia—represent the governing party, acclaimed by the voting public, and convoked only to declare their assent or dissent of decisive political or legislative steps taken by the Leader under his own responsibility. The *Länder* have, as yet, not ceased to exist; but their field of independent action is very small and is being more and more limited to the administration of provinces endowed with some faculties of self-government. Moreover, the Leader of the Reich, by virtue of a law enacted shortly after his coming into power, is entitled to nominate for every Land a governor (*Reichs-Statthalter*) whose primary charge it is to guarantee conformity of local administration and legislation with the trend of Reich politics. Under such circumstances, a constitutional lawsuit between a Land and the Reich or between two different *Länder* is quite unimaginable; no wonder that the Constitutional Court fell into oblivion.

This radical change in German public law has not been made by promulgating a new constitution but by a steady practice that is certain of its aims. A cautious legislation, enacted by installments, was capable, thanks to its elasticity, of adapting itself to the varying demands of the time to correct the inevitable errors made in the pursuit of such a gigantic task. Caution bade the National Socialist leaders refrain from rearranging the political units of the Reich and from dividing its territory in accordance with the distribution of tribal races and economic connections. They are preparing such a new and rational division, destined to supersede the arbitrary results of feudal wars and dynastic treaties,

by the territorial organization of the party, which can be changed every time experience demands a reconstruction.

Having sketched out the dramatic evolution of German constitutional law during the last hundred years, I shall now try to show, in a short survey, the development of other legal branches from wild incoherence and absurd differentiation to unification and concord. The second change was the consequence or corollary of the first, for it needs some communion of might to make a communion of right possible.

First of all, the law of commerce followed the railway tracks of Germany and jumped over the state frontiers. In 1848, the general German law of bills of exchange (*Allgemeine Deutsche Wechselordnung*) was accepted by the Council of the Confederation and introduced into the several states of Germany as a uniform law. It was a masterpiece of legislation and technically in advance of the French and Anglo-Saxon laws. Consequently, when in 1910 and 1912 the representatives of more than forty nations met at a congress at The Hague to discuss a draft for an international code dealing with the law of bills of exchange, it was the German law that prevailed substantially. At this congress, the famous French lawyer, M. Lyon-Caen, and myself were nominated general co-reporters of the working committee; the draft code prepared by us in accordance with the resolutions of the committee met with the approval of the congress and served as a model, twenty years later, for the draft of a uniform bills of exchange act proposed by the League of Nations to its members.

Secondly, in 1861, the Federal Council of Germany adopted a general German code of commerce (*Allgemeines Deutsches Handelsgesetzbuch*) modernizing the different old usages and statutes then in force and unifying a law whose variegations had once hampered economic and financial intercourse between the German states. It is to be marked that these two important laws

were also introduced in Austria. The German system of commercial law in general, like that of bills of exchange law in particular, has been of incontestable influence on the development of the commercial law of other countries—and on international treaties concerning this matter.

It was aptly pointed out by a delegate to the Philadelphia Convention of 1787 that to be sure of getting and retaining a really common law, it should be dispensed by a common judiciary—therefore, the Supreme Court of the United States came into being. The same reason caused the sovereign states of the German Confederation to institute a Supreme Federal Commercial Court (*Bundes-Oberhandelsgericht*) for lawsuits concerning the interpretation and application of the uniform codes of commercial law. The Court began its judicature in 1863; before that time commercial cases had been decided by many courts in Germany as the last resort, and though the Hanseatic Court of Appeal at Kiel enjoyed the greatest authority in commercial matters, differences of interpretation and application of the originally uniform law could not always be avoided. The institution of the Federal Commercial Court prevented further splittings of the law. With regard to this fact, the German delegation to the Congress of The Hague in 1912 moved to institute an international court of bills of exchange law whose task it would have been to control the uniform application of the uniform law by the national commercial courts.

When the German states, except Austria, had been unified by Bismarck, the *Bundes-Oberhandelsgericht* became *Reichsoberhandelsgericht*. Its seat remained in Leipzig, the most important center of international commerce and the traditional locality of the biggest fair in continental Europe. The growing consolidation of the second Reich allowed the Diet to undertake the unification of other branches of law. The near relation to

commercial law is and always has been the monetary system and legal tender. Now a hundred years ago these matters were, in the German states, in a hopeless confusion. Every petty dynast was eager to exercise his sovereign right of having his own mint and of seeing his head on the coins. The coinage itself was of varying value: there circulated in Germany the Prussian dollar (thaler), the Austrian florin (gulden), another florin in Southern Germany, the Hanseatic mark, and some coins of foreign countries: the Venetian ducato in the southeast, the French franc and louis d'or in the southwest, the English sovereign in Hanover where, until 1837, the British king reigned over a German kingdom. Under the Bismarckian constitution such a confusion of standards seemed unbearable; therefore a monetary reform (*Münzgesetz*) in the beginning of the seventies introduced the mark as legal tender for the whole Reich. At the same time, the banking law was unified (*Bankgesetz* of 1872) and a central bank (*Reichsbank*) was instituted. The mark was chosen as the monetary unit because Bismark realized the international prestige of the Hanseatic money; he foresaw that under this name the new standard of coinage would be more easily introduced into the growing international commerce of industrialized Germany. The coinage was based on gold; but, to overcome the opposition of the Prussian population, the monetary law provided that the silver dollar, reckoned as three marks, should also have the quality of legal tender for payments not higher than one hundred marks. In this way German monetary law provided for a double system: one based on gold and silver alike and destined for smaller home commerce, one based on gold alone and used in the heavy traffic and in international affairs. The system was called a "claudicant gold standard"; it was fervently attacked by the bimetallists and by the friends of a silver standard (comparable to similar tendencies in the United States), but it lasted until

the great war, when the Federal Council decreed the departure of the legal tender from the gold standard and from every metallic base whatsoever.

It is well known that the Reich financed the war not by taxes but by loans; how after losing the war it inflated the paper currency until a billion paper marks could pay not more than a former gold mark's worth; how by this monetary revolution middle-class property was devastated and the people's belief in right and justice was shaken. At the same time, Germany's credit in foreign countries sank to a very low level. The fearful burden of reparation debts heaped by the Versailles treaty on the economic shoulders of the German people increased the danger of utter collapse, especially since the government of that time tried to pay these debts by borrowing, *viz.*, by substituting financial for political debts. The winners of the war demanded our money and refused to take our exports of goods; and money we had not. In that time it was impossible for German courts to dispense justice; the foundations of every contract were shaken and the only solution to be found was to distribute the necessary injustice between the parties to contracts. This way was trodden first by the supreme court at the end of 1923; legislation, then delegated by parliament to the cabinet, followed suit and legalized the enormous losses of the money-saving and money-lending part of the people. By a sort of financial miracle a new paper standard, the reichsmark, was created and took the place of the prewar goldmark; but in spite of the horrible experiences of inflation, the Reich and the German *Länder* and townships persevered in their dangerous borrowing practice. When in 1933 the National Socialist party came into power, nearly all public corporations from the Reich down to the smallest city were more or less bankrupt. The new government openly acknowledged this fact by the restriction of payments on foreign debts, by manipulating the value of the

reichsmark, and by controlling the exportation and importation of merchandise with a view to equalizing them, in order to prevent an increase of foreign indebtedness. At the same time, it tackled the gigantic problem of unemployment by giving the millions of "forgotten men," instead of the demoralizing dole, some useful work. The public funds raised for that purpose were not remarkably higher than those previously raised for doles and doubtless bore better fruit in every sense. When foreign critics are contrasting the readiness to spend these funds on big works on German soil with the slowness to pay interest for and to sink foreign debts, they forget that the government can pay for those works in reichsmarks at the home value but must pay foreign debts in foreign money they cannot get, wanting a surplus of exportation. It is true the new system is an artificial one, only workable by means of very complicated legislation, but it is the only one to show the way to a restoration of German public and private finances on a solid base and, with an international rearrangement of the world's monetary systems, mutual indebtedness, and commercial intercourse, it will disappear.

One of the surest points of this new financial legislation is the necessity for the legislator to impose very severe penalties on transgressors who are unable really to understand the reason of the law and who act as every sensible man would under natural circumstances. In proportion as state control over private affairs increases—unavoidable under present conditions of Western civilization—the gulf between official penalism and popular ideas about punishable deeds widens. In this respect, there is some analogy between the absolutistic state of the eighteenth century and the authoritarian state of the twentieth. In 1836, most of the criminal laws then in force in Germany were given by absolute monarchs; the most famous exception was the first codification of German criminal law, the *Constitutio Criminalis*

*Carolina*, promulgated in 1532 by Emperor Charles V with the assent of the feudal *Reichstag* at Ratisbon, and remaining in force in some parts of northern Germany until the first year of the Bismarckian Reich. In all these codes penalties were very severe; even those of the Napoleonic criminal code, introduced into western Germany at the beginning of the nineteenth century, seemed, to the liberal mind of the epoch, too harsh. The ideals of Beccaria's book, *Dei Delitti e Delle Pene*, invaded Germany. The greatest German criminalist, Anselm von Feuerbach (known as a staunch opponent of an arbitrary and autocratic dispensation of criminal law), who died in 1833, had prepared the path for criminal law reform in the different states of Germany. He insisted on the psychological factor of punishment: its force of deterring would-be malefactors and preventing crime. After the foundation of the Bismarckian Reich, public opinion revolted against the differentiation of punishment for the same acts committed in different territories of the Reich; therefore, the *Reichstag* in 1875 enacted a new criminal code combining the psychological principles of von Feuerbach with the old principle of just retaliation.

With the strengthening of humanitarian influences and the rising tide of socialism a new element began to dominate the practice of criminal law: the use of punishment for the moral reformation of the culprit in order to educate him from an anti-social to a social character. The champion of this tendency in Germany was Franz von Liszt. The widespread effect of his lecturing and literary activities was to mitigate German criminal law after the pattern of some recent Anglo-Saxon legislation, especially that concerning the different forms of probation as a treatment of crime. Together with the disintegrating and brutalizing consequences of the World War and the revolt of 1918, this mitigation of criminal law augmented the numbers of our crim-



inals in a fearful manner. The sudden downfall of the traditional authorities weakened respect for every sort of executive, the monetary inflation, respect for private property; the doctrines of Marxism and communism called into question the very foundations of our social system; at first secretly, then more and more openly, a bloody civil war was in preparation. With the beginning of the National Socialist era, this latter tendency was quenched by brutal force; afterwards a criminal reform was begun, which is nearing its promulgation as general law and which has already been prepared by some special legislation. Its most characteristic features are: hardest punishments threatened for high treason and for all crimes against the State and its authorities; a general reaction against the liberal and humanitarian treatment of crime in favor of an effective, if severe penal system; penal discrimination between crimes perpetrated against a common cause and those against a private interest; durable assurance of protection of society against habitual criminals and incorrigible offenders.

A foremost place in questions of public interest in Germany of today is allotted to the race problem. In 1836, the emancipation of Jews was not yet finished everywhere; the next hundred years saw not only all the old racial fetters fall, but even a paramount influence of this intelligent and thrifty race secured in many branches of German private and public life, especially among lawyers, physicians, bankers and other merchants, artists, and journalists. They intermarried frequently with the oldest aristocracy of the land, the proudest officers of the army, the highest functionaries of state bureaucracy. Their sway over public affairs and public opinion in Germany was great in proportion to their number. After the World War, the eastern gates of our country were opened to an inundation of Polish and Russian Jews attracted by the opportunities of a society thrown into the cauldron

of decomposition. The result was a violent reaction of National Socialism against a legal development of more than a hundred years.

A similar cyclic movement may be observed in German administrative law. When our period began, the executive power was in most parts of Germany absolute and arbitrary; there was no judicial control of state administration except in the Hanseatic republics. But the study of Anglo-Saxon institutions caused German publicists and politicians, of whom Rudolf Gueist was the most famous and influential, to introduce in one German state after another the system of administrative jurisdiction, together with many kinds of communal self-government. They followed the old ideal of "government by law, not by men." At the end of the Bismarckian Reich, nearly every state boasted a modernized administrative judiciary; the most respected and efficient was the Supreme Administrative Court of Prussia. However, judicial control of administration was, at that time, reserved for the single sovereign states. Under the Weimar constitution, the competency of the Reich was extended to many administrative affairs; it seemed natural to institute a Supreme Administrative Court of the Reich and to superpose it upon the similar courts of the *Länder*. But the bills drafted for a respective enactment did not pass the Diet; after January 30, 1933, the new government felt that, in the midst of the inner and outward dangers of its situation, the executive ought not to be bound, on every step, by the fetters of judicial control. Surely administrators and legislators are men; so are judges. Law without men to dispense it is inoperative; so is law dispensed by recalcitrant judges. No wonder that the new leaders preferred the odium of destroying the liberal law state (*Rechtsstaat*) to the situation of an executive whose new ideals of a popular renaissance could be thwarted by the old-fashioned constitutional anxieties of the judiciary. At the

moment, administrative jurisdiction has in many cases been superseded by the old form of application in both the central authority and the single states; the authoritarian state of 1936 has assumed the position of the absolutistic state of 1836. Nevertheless, the project of a supreme administrative court of the Reich has not been waived at all; it is probable that in more quiet times "government by law" and "judicial control" will play an ampler part in the distribution of public law in Germany, though individual rights will always be second to the rights and interests of the people at large.

As to private law or civil law in general, the success of the unification of commercial law encouraged the imperial government and the Diet to codify this law also. Here, as noted above, the local divergences were greatest and most inveterate. In fact, the preparatory work for the German Civil Code lasted more than twenty years and ended with a long list of law matters where the particular legislation of the single German states was maintained. The emanation of the code was due to a compromise between the principal systems then prevailing in Germany; but preëminently it bore the stamp of the Roman law, the *usus modernus Pandectarum*. The reason for this lay in the great authority of the German *Pandekisten*, the professors of the law faculties of German universities. Many of them, like Friedrich Karl von Savigny and Rudolf von Jhering, were of world-wide fame; in very difficult cases it was an old practice of German courts to send the files to a faculty of law for an opinion that in most cases was accepted as judgment. In the committee drafting the bill the renowned Pandectist, Bernhard Windscheid, was of great influence. When the code was published, many, especially the great Germanist, Otto von Gierke, found fault with it because of Windscheid's Romanism; on the other hand, Socialists opposed it because of its capitalistic structure, most impressively Anton Menger in his book on

the Civil Code and the have-nots (*das bürgerliche Recht und die besitzlosen Klassen*). But it remained, on the whole, intact until the National Socialists came into power. For these, the Roman and the capitalistic features of the code are likewise unbearable; we now see a revival of old German law together with a reform of labor law. The outstanding novelty is the new agrarian law. While the code and its by-laws had mobilized landed property as much as possible and had assimilated real estate to chattels in every sense, National Socialist legislation treats the land as the common property of the whole people and the owner as trustee of the national interest. On the one side, a good farmer is secured against unavoidable mishaps and too heavy debts; on the other, he cannot freely dispose of his farm either by alienation or by heritage, but it remains undivided in the hand of one successor as an *Erbhof*. A negligent farmer can be dispossessed by judgment of a special court (*Erbhofgericht*). It is the tendency of this law to multiply the number of small but self-contained farms and to strengthen the social position of the farmer no less than that of the industrial workman. On that account, the National Socialist law is contradistinctive to the Bolshevik law of the so-called *colchoses*, the agrarian communism. The new general civil code for Germany is in preparation.

Before the Civil Code of 1896 (in force since January 1900) was published, the Diet had unified the procedure in criminal and civil matters. The two codes introduced liberal measures, imitating some of the principles of French legislation but modified by Hanoverian patterns. Stress was laid on safeguarding the interests of the defendant and the accused. The bulk of the proceedings was laid in the hands of jurists; many of its formalities remained utterly strange and incomprehensible to the common people, as I myself could often see when sitting in judgment. The "Third Reich" intends to popularize procedure and to renew old German

forms of it; there have been changes in many parts of the law, but the reformation of the codes at large has not yet been finished. The Reich's ministry of justice and the Academy of German Law are joining in the preparatory work.

In 1879, after the promulgation of the Commercial Codes, the Criminal Code, and the two Codes of Procedure with all their by-laws, the *Reichsoberhandelsgericht* in Leipzig was dissolved and a *Reichsgericht* (Supreme Imperial Court) was instituted. It was entrusted with the control of the uniform application of the general laws and of such particular laws as the single sovereign states chose to submit to it. In later times, many parts of this vast jurisdiction were committed to the charge of special courts; for instance, labor law to the *Reichsarbeitsgericht*, cases of taxation to the *Reichsfinanzhof*, certain cases of an economic nature to the *Reichswirtschaftsgericht* or *Kartellgericht*. When I was president of the supreme court, I strove as best I could against this dismemberment of the central and supreme judiciary, but in vain. Most probably the centralizing force of the National Socialistic regime will bring a salutary change in this direction.

Some branches of law are too young to have their progress through the last hundred years reviewed: I mean the law of automobiles, air law, and radio law. I had the good luck to coöperate in the formation of these branches for Germany. In 1905, I was called to the imperial ministry of justice to draft and to defend before the Diet a bill on automobile law. It was based on the idea that the responsibility for special casualties depends on the functions of the machinery and the driver (*Betriebsgefahr*), without regard to the personal guilt of the driver or owner, cases of *force majeure* being excepted. In 1910, I drafted the first bill on air law; it was discussed in Parliament before the World War but, with many amendments, came into force only in 1922. In 1924, I founded, with some lawyers and professors, a free com-

mittee for radio law (*Deutsche Studiengesellschaft für Funkrecht*), which edited a *Quarterly Review* (*Archiv für Funkrecht*) and a two-volume bibliography of radio law.

But it is impossible to confine, within national bounds, the law dealing with these wonderful inventions of human technical genius; like the efficiency of the means, the law directing their application must be international. So Germany has agreed to every multilateral treaty or agreement respecting these matters, as she has collaborated with other nations in unifying the international law of commerce, shipping, trade-marks, copyright, etc. In this field, much is left to be done. When I was lecturing, in 1930, before the Institute of Politics at Williamstown, Massachusetts, on "The Evolution of Public International Law in Europe since Grotius," I heard Colonel Lindbergh deliver a lecture on the need for a world-wide assimilation of the laws and regulations of aeroplanes. He was certainly right. It is my fervent hope and my firm conviction that, for Europe, aircraft and air law will overcome in the not far distant future those laughable barriers erected by a misguided and distrustful postwar diplomacy to the detriment of international intercourse and understanding, and renew, on a broader scale, the benefits railways have since 1836 bestowed on a then divided and afterwards united Germany.

## THE HISTORY OF LEGAL EDUCATION

JOSEPH HENRY BEALE

THE practice of law in early times was the practice rather of a trade than of an applied science; and admission to it, as to other trades, was through apprenticeship. The outer barrister in England was an apprentice until he was called to the inner bar and became a *serviens* or serjeant. This, of course, corresponds to the journeyman of the mechanic trades. There is a similar history in the study of medicine.

This view of law prevailed in this country for a hundred years or more, and the young man learned law only by going about with a lawyer, observing what he did and then doing likewise. There being few books of reports, the recollection of what a man had seen happen in the courts was, as in the case of the earliest English barristers, the method of training for the bar. The other branch of the profession in England, the attorney, was even more clearly a branch of trade. The young man desiring to become an attorney was articled and became an attorney's clerk or apprentice, and so remained until he was out of his articles and became a journeyman. All the law he learned, and that must be law enough to brief his cases, he learned in this way. In this country the two branches of the profession tended to merge into one. In New England, at least, the lawyers (and there seems to have been one in every town) were probably articled clerks who, rather than enter the struggle for professional advancement in England, tried the less crowded ranks of colonial lawyers.

By the middle of the eighteenth century two developments began to be clear. In the first place, the Inns of Court, which had started, among other things, to furnish instruction for the young apprentices, began really to teach; and a number of men were

sent from these Colonies to learn law in the Inns of Court. Meanwhile a practice was growing for good lawyers, particularly country lawyers in whose practice there were times of relaxation from pressure, to take apprentices at a fee, usually one hundred guineas, and give them some instruction in small classes. Four or five students would congregate in a good country office, would receive together suggestions from this master regarding books to read, and would from time to time be catechized by him on their progress. In every state there came to be well-known offices in which bright young men were trained. The books read were a heterogeneous collection of ancient common law, civil law, international law, history, and politics.<sup>2</sup>

This practice was bound to develop, and the final step in its development was taken when Judge Tapping Reeve in Litchfield, Connecticut, opened what he called a school of law. He himself gave lectures to his students on certain branches of law with which he was familiar, and he employed other lawyers of the neighborhood to do the same. A set of notes from the Litchfield Law School is the prize possession of many libraries. In such a set of notes taken by Elisha Whittlesey during two years, 1813-1814 and 1814-1815, the following subjects were pursued.

First, Procedure, including Pleading, Evidence, and Powers of the Chancellor.

Second, *Lex mercatoria* (by James Gould), including Insurance, Bills and Notes, Executors and Administrators. This was succeeded by Private Wrongs, what would now be called Torts, and by a short sketch of the courts of New York.

The third volume of notes, beginning in June 1814, began with Municipal Law, then including the Law of Statutes. This was followed by lectures on Domestic Relations, namely, Master and Servant, Husband and Wife, and the Law of Sheriffs. In this year these lectures were given by Mr. Gould, not by Judge Reeve; and



the student declined to take the lectures, apparently relying upon the publication of Judge Reeve's notes under the title *Law of Baron and Feme; Parent and Child, Guardian and Ward*. The fourth volume, dated July 1814, was entirely covered by a course on Contracts by Gould. Throughout these lectures there were copious references to English cases and books and one of the maxims placed by the student at the beginning of his notes was "*Lex est certissima cassis.*" Some of these lectures were published by the lecturers: Reeve's *Domestic Relations* and his *Treatise on the Law of Descents*, and Gould's *Common Law Pleading*. So far as can be learned by comparison, the books follow the lectures almost exactly.

This was the beginning of the teaching of law in schools. It consisted of lectures, but lectures so given that the student could take in longhand every word and every citation.

It was obviously foolish to copy the words of a treatise after the treatise was published; so, in the lecture notes referred to, Mr. Whittlesey declined to write the lectures on Husband and Wife on the plea that they were about to be published by Judge Reeve. This exact form of teaching, therefore, when carried on in a school that had a sufficient library of published treatises, would consist in the reading of the treatises, followed by comment on them by the teachers, and this was the next form of legal teaching. When the Harvard Law School was started in 1817, the first professor brought his library to the rooms of the school and referred students to the books in the library. It is probable that he catechized the students or "examined" them on their reading, but of this there is no proof.

The next step in legal education was taken, or at least envisaged, by Judge Story. In his inaugural lecture upon entering on his professorship, he laid down the proposition that law is a science and should be studied as such by students capable by

former training of undertaking such study. It is doubtful whether Judge Story ever really put his ideas into effect in the law school. His associate, who was in the school all the time and carried the burden of teaching, was a former teacher in the Northampton law school, a later imitator of the Litchfield Law School; and he was followed by Greenleaf, who prepared, as soon as he might, a book upon evidence which he used with his classes. This continued to be the method of instruction in the Harvard Law School until 1870; in that year the library was made up largely of sets of books published by the professors and used by them as a basis of their teaching. The method of teaching, then, was that every student had in his hands a copy of the book which was the subject of the lectures, was catechized upon it by the professor, and enlightened by the professor's comments.

Other early American law schools followed on the whole the procedure adopted by Story's colleagues and successors. Thus, in 1839, the Cincinnati Law School had a one-year requirement for the degree; in that year Walker's *Introduction to American Law* was studied together with practice and a moot court, and there was an examination by a committee of legal gentlemen. This was changed within twenty years to examination by the faculty. The examination meant was apparently oral. In the Columbia School of Law we have a similar system somewhat later. The course of study covered two years and the arrangement was better than that at Harvard in that the curriculum was progressive. The prerequisite for a degree was an oral examination by the leading teacher in the school. Transylvania, a still earlier school, predecessor of the University of Kentucky, has left no details of course of study or degree. In the Albany Law School the curriculum, in 1851, called for three terms of sixteen weeks each, the method of examination being much like that adopted at Columbia. Twenty years later, however, the terms had been reduced to

twelve weeks, making it easily possible to graduate in one year.

The University of the City of New York (now New York University) took the next step in legal education, a step far ahead of its time. The plan for this school was propounded in 1835 by Mr. Benjamin F. Butler, then leader of the New York bar. He required at least three regular professors, a classification of students as to attainments, and a course of study of three years. He thought the lectures should be adapted only to students intending to practise in New York. One course was to be given each year by one of the professors and the "principal professor" was to give a general or parallel course to the entire school. Three such courses were to be prepared, to be given in successive years so that each student would have one of the courses each year. He was in favor of some form of text reading preparatory to instruction by lectures. The school itself began in 1838. Mr. Butler had accepted appointment as principal professor, his lectures being given at eight o'clock in the evening. Each professor lectured to one class on one "department of law." Professor Kent, for instance, lectured to the second-year men on Persons and Personal Property. The course of lectures as outlined was a very full if not very deep treatment of the subject covered. The special subjects given in this way were: for the first year, Pleading and Practice; for the second year, Persons and Personal Property; and for the third year, Real Property, the remainder of the law being covered by the parallel or general course. Each student, therefore, gave two hours a week to the study of law, one with the principal professor and the other with the departmental professor. The course of study was obviously a thin one, but it was clearly a decided advance over anything that went before or that came after for a generation.

After the death of Story, Professor Kent was invited from New York University School of Law to Harvard Law School,

and came, bringing with him the *course* as it had been established in his former university. The idea was at once adopted by his colleagues, and he may be said, therefore, to be the founder of the present teaching by subject courses. He stayed only a year at Harvard, but the form of teaching by courses, very greatly improved, as will be seen, by Langdell, has continued as the basis of the organization of the curriculum until the present day.

This invention of the course has fixed the character of legal teaching for nearly a century. As more and more subjects of study have been developed in the progress of our law, this organization has compelled more and more courses to be given, more than can be taken by any one student, and has led to a very wide election of courses. This was attacked by Professor Hufcut in his presidential address at the Law School Association in 1904.<sup>2</sup> Nevertheless, the logic of events has forced this development and this multiplication of courses. When the writer was in school any student could study all the courses offered; but at that time the students circulated a petition for more courses, and as a result of this petition several courses were added, all desirable and most necessary to legal education. Each school has wished to offer the full assortment of courses and the result has been larger faculties and an increasing inability for a student to pursue all courses offered. Furthermore, the length of the course has been rigorously standardized, and when a subject emerges as proper for teaching it has to be compressed or stretched to the measure of the standard course. As a result, a man is forced to limit his study to a certain number of courses and these courses may have too large and important a content to master in the time or may be unduly padded to meet the necessity of so many hours. Nothing, however, has as yet been invented to take the place of the course. Our law-school curricula are still overloaded with casebooks and courses.

The study of law from textbooks or from lectures, as has been said, continued unbroken in American law schools until 1870. By the lecture method Professor Dwight of Columbia, Professor Minor of Virginia, and Professor Cooley of Michigan were the great teachers. A change in the whole method of teaching, however, began with the publication of Professor C. C. Langdell's first casebook in 1870. He instituted the casebook for study; he did not use it as his pupil, Dean Ames, used it later—as material for free discussion. It was Ames who really settled much the best method of teaching up to his time; that is, the teaching by free discussion between members of the class and between the class and the teacher. This method of instruction developed men who had initiative of thought and enthusiasm. Going out into practice, they were able to handle a new set of facts with authority and to argue with enthusiastic devotion; and what they conceived to be the right idea of the law carried great weight. For twenty years this method was peculiar to the Harvard Law School, and it was not even the exclusive method there; but in the early nineties of the last century it began to spread throughout the law schools, and by 1910 there were probably no first-rate schools left that had not undertaken the method of teaching by cases and discussion.

One weakness of this method of teaching grew out of the fact that it was born in the Mid-Victorian years and that its inventor had said that all materials for legal study can be found in the lawbooks in the library. As the growth of knowledge brought wisdom, it became apparent that there were other elements to be considered in the study of law besides the historical and that one must step outside the books of reported decisions in order to learn the law. This need has been increasingly felt in the last twenty-five years. Two methods had been taken to supply the

missing element of legal study: one to alter the case system by the inclusion of other than strictly legal material in the books studied, the other to have these elements supplied by the teacher to his class, but not studied by the class from books. It is impossible at this time to determine which is the better method.

Controversy between those favoring the case system of teaching and adherents of the lecture system had quieted by 1900 and other reforms occupied the minds of teachers. The Harvard Law School required for admission a degree or its equivalent from 1898; in 1900 representatives of several of the more advanced schools met to form the Association of American Law Schools. This was a great step ahead in legal education, for the standard set by the Association became the goal for smaller schools which were as yet far from it. The requirements for admission to the Association involved: a minimum requirement for admission to the school (effective in September 1901), a minimum time of study which after 1905 was to be increased to three years, examination for the degree, and a minimum library.

To take these requirements up in order: The requirement of high-school graduation, then adopted, was far beyond that of most law schools, and many good schools were obliged to stay out, or even to drop out, on account of it. But the Association not only insisted on it, but gradually increased it; until now two years of college work successfully concluded in residence at an accepted college is required, and eighty schools, members of the Association, make such requirement.

The time of study, first two and then three years, has been rigorously adhered to, and few if any existing schools require less than three years.

The examination for the degree, meaning a written examination, is now universal.

The requirement of a library was exceedingly low: the reports of the state and the United States. This has been gradually increased until it is now ten thousand volumes.

Each school is now required to have four full-time instructors.

The effect of these requirements in this country is incalculable. They have standardized legal education at a high level.

The effect of the Association was everywhere felt by 1910, and legal scholars, now sure of high standards in the school, turned their minds to other things, and these things have continued to occupy their minds since that time. They may be summarized thus: new methods of teaching, new conceptions of law, higher legal education.

Several methods of teaching law have been tried in the last generation, the most important of which has gained many adherents. This is the so-called functional approach to law. It is clear, of course, that law can only function in a setting of facts, and that somehow a student should learn to deal with the factual situation in which law is employed. Older teachers tried to make the student fact-conscious by studying many cases of varying facts in which a single legal principle emerges. One who read, as some of us did, all the cases cited in Ames's notes in his early casebooks got fact patterns in plenty. It must be confessed that not all students read so many cases; not all got that mastery over facts which such wide reading gives. Since 1910 many teachers have thought it best to steep their students in the facts that may be expected as the background of the law that is being taught. One distinguished teacher spent a year in a bank, learning the facts before he tried to teach them; and the experience has certainly given him power. It is believed that the "factual approach" is most useful in commercial law, where fact patterns are more limited in number. It is too early to hazard an opinion on the success of this method. It must be settled by the greater ease with

which the run-of-the-class exponents of each method find it possible to solve the problem of applying law to a novel fact pattern.

During the same period a new conception of law has arisen, *soi-disant* realistic. Its contentions are, first, that not alleged principles of law but the reaction of judges to the facts determine the decisions of courts; second, that law comes into existence only upon the decision of a court, and does not exist prior to the decision. This conception was held so strongly by its advocates that a new school was formed, the Johns Hopkins Institute of Law, headed by the extremely able protagonist of it and manned by other teachers devoted to it. For five years they were expected by the profession to show some fruits of their doctrine; but at the end of that time the experiment was given up. To the writer it seems that such a doctrine is doomed to sterility, principally because a law that is alleged to be a law by the realists fails to perform the first function of law: to keep each one in his place and to prevent wrong conduct; and brings their law into play only upon the failure of the chief purpose of law: right living.

The third new development has been real graduate instruction, intended particularly for the training of teachers and for training in research. It has become common for the schools to renew their faculties from among those who have received the doctor's degree from one of the three or four large schools. The work of this particular teaching has not yet been isolated from the teaching of lawyers in the ordinary work of the schools, but there are constant tendencies toward such isolation of the interests of the graduate from the undergraduate instruction. Those who have taken a large part in graduate instruction have come to look upon it as a profession distinct from the instruction of undergraduates. By this it is not meant to suggest that teachers of undergraduates should not at the same time teach graduates, for it seems to be very clear that the teaching of graduates greatly improves the teaching



of undergraduates, and it is desirable to have the same man do both kinds of teaching. Nevertheless, he must be able to be one thing to the undergraduate and a different thing to the graduate. One of the principal problems of the teaching of law to undergraduates is to determine what to leave out, for there are very few teachers who do not know more about law than can be imparted in undergraduate instruction. The problem of the teacher of graduates is how to put into his course all his own learning and experience and to relate them to the experience of his pupil. The teaching of graduate students, particularly from Europe, Asia, and Africa, calls for a high degree not only of wisdom but also of insight into the working of an alien mind.

The American law school has never followed the French school in teaching not merely law but economics and public affairs. It is, however, approaching such schools in the width of its graduate instruction. It is the author's belief that that development of a technique of teaching law which was the chief feature of legal instruction in the fifty years following 1870 will be succeeded by a technique of fostering higher study and research, in graduate instruction at least, and that the schools which are prepared to enter into that branch of teaching will even more greatly affect legal thought and legal institutions than their predecessors.

I have not yet spoken of the great part which the school library plays in the instruction of the students. A library of forty thousand books was ample in 1900 and one of eighty thousand is probably still ample for the teaching of undergraduates. For the teaching of graduates, however, the library must cover vast sources of knowledge not included in the law-school library of 1900. If he studies criminology, the student will need books in all languages, taking up all phases of criminal careers, criminal trials, and post-sentence dealing with criminals. If he studies

jurisprudence he will need the thought of the world from Greek times until today. If he is studying international law he will need a complete collection of state papers, arbitrations, publications of the League of Nations, as well as every book that may have any bearing on the intercourse of nations. If he is studying public law he needs in the library the greatest variety of books concerning every kind of state action; indeed, it may fairly be said that he needs every book that describes human life. He needs, in fact, 300,000, 400,000, or 500,000 books today, increased from year to year at a tremendous rate. This fact must necessarily limit the number of schools that can teach graduate students properly. Two or three schools have been collecting books and papers that enable them properly to teach graduates in two or three or a dozen subjects. Other schools, very highly endowed, are now able to collect a great library. But it seems clear that not more than five or six schools will in the nature of things be able to enter, properly equipped, on this fascinating attempt to teach the teachers of our schools how to research and how to work up their materials.

A great handicap of our legal education has been the rapid growth in size of American law schools. In a lecture school the size is unimportant. In a school that really teaches by discussion it is a matter of careful and constant consideration.

On the other hand, the resort of students to law schools is not to be discouraged, for it has resulted in far more general learning at the bar than ever was true in a preceding generation. It may be confidently asserted that, notwithstanding the number of poor law schools turning out poorly trained lawyers, the standard of learning and character of the bar is fostered by law schools.

These handicaps of the last generation could never have been met with the kind of instruction that was common fifty years ago. At that time there were very few law schools that were

manned by regular professional teachers. Most schools were taught by neighboring lawyers who took scanty time from a busy practice to explain to the classes how they had secured triumphs at the bar. Such teachers could use only the simplest methods of teaching. Gradually, however, these instructors were superseded by a professional faculty of well-trained teachers, some of them without experience at the bar, some with an experience only long enough to enable them to realize how law actually works in practice. The modern form of teaching has proved very difficult for lawyers who have long been in practice. The technique of teaching requires at the beginning of a teacher's experience both youth and a remembrance of the best examples of teaching known to the young teacher. Of course, many excellent teachers have begun teaching in middle age, but their success has meant long and difficult labor to learn something that their younger colleagues knew when they began. The law schools have proved to be the best normal schools to train teachers of law.

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## NOTES

<sup>1</sup> An interesting account of legal study in lawyers' offices may be found in 1 WARREN, *HISTORY OF THE HARVARD LAW SCHOOL* (1908) 133 *et seq.*

<sup>2</sup> PROCEEDINGS of the Fourth Annual Meeting of the Association of American Law Schools.

# ONE HUNDRED YEARS OF ADMINISTRATIVE LAW

ARTHUR T. VANDERBILT

## I

ONE hundred years ago administrative law was hardly a recognized term in English law,<sup>1</sup> and it was apparently unknown to American law until introduced by Goodnow half a century ago.<sup>2</sup> Today it is concededly the fastest growing part of our jurisprudence, threatening to overshadow, by comparison, the work of our traditional courts.<sup>3</sup>

Despite its phenomenal growth, recognition of it by the profession has lagged until recently. As late as 1915 A. V. Dicey, who for more than a quarter of a century dominated English thought on constitutional law, felt justified in continuing to deny the very existence of administrative law which in 1885 he had categorically outlawed:

*"Droit Administratif* is a term known under one form or another to the law of most continental states, but it is one for which English legal phraseology supplies no proper equivalent. The words 'administrative law,' which are the most natural rendering of *droit administratif*, are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation.

"This absence from our language of any satisfactory equivalent for the term *droit administratif* is significant; the want of a name arises at bottom from our non-recognition of the thing itself.

"In England, and in countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles upon which it rests are in truth unknown."<sup>4</sup>

In his denial of the possibility of the existence of administrative law, Dicey undoubtedly expressed the conviction of the profession at large. Though he was driven in 1915 by the decision of the House of Lords in *Local Government Board v. Arlidge*<sup>5</sup> to admit its existence—significantly, his article bears the title *The Development of Administrative Law in England*<sup>6</sup>—not all of the legal profession was ready to capitulate on the question of its desirability. Thus, as late as 1929, we find Lord Chief Justice Hewart of Bury writing, in *The New Despotism*,<sup>7</sup> with a trenchant pen (the vigor of which is fatefully reminiscent of Lord Chief Justice Coke in his losing controversy, with Lord Chancellor Ellesmere, on the supremacy of another institution clearly administrative in its origin<sup>8</sup>) the creed of the modern bureaucrats:

"1. The business of the Executive is to govern.

"2. The only persons fit to govern are experts.

"3. The experts in the art of government are the permanent officials, who, exhibiting an ancient and too much neglected virtue, 'think themselves worthy of great things, being worthy.'

"4. But the expert must deal with things as they are. The 'foursquare man' makes the best of the circumstances in which he finds himself.

"5. Two main obstacles hamper the beneficent work of the expert. One is the sovereignty of Parliament, and the other is the rule of law.

"6. A kind of fetish-worship, prevalent among an ignorant public, prevents the destruction of these obstacles. The expert, therefore, must make use of the first in order to frustrate the second.

"7. To this end let him, under Parliamentary forms, clothe himself with despotic power, and then, because the forms *are* Parliamentary, defy the Law Courts.

"8. This course will prove tolerably simple if he can (a) get legislation passed in skeleton form, (b) fill up the gaps with his own rules, orders, and regulations, (c) make it difficult or impossible for Parlia-

ment to check the said rules, orders and regulations, (d) secure for them the force of statute, (e) make his own decision final, (f) arrange that the fact of his decision shall be conclusive proof of its legality, (g) take power to modify the provisions of statutes, and (h) prevent and avoid any sort of appeal to a Court of Law.

"9. If the expert can get rid of the Lord Chancellor, reduce the Judges to a branch of the Civil Service, compel them to give opinions beforehand on hypothetical cases, and appoint them himself through a business man to be called 'Minister of Justice,' the coping-stone will be laid and the music will be the fuller." <sup>9</sup>

In *Bureaucracy Triumphant*,<sup>10</sup> Professor C. K. Allen of Oxford, reviewing this work and Dr. F. J. Port's *Administrative Law*,<sup>11</sup> sustains the Lord Chief Justice's philippic, in essence, by concluding:

"We remain unconvinced, then, of the necessity for specialist tribunals and a specialist administrative law. Unless we are prepared to admit that the whole constitutional centre of gravity has moved from the legislature to the executive; unless we are willing to be governed not by ourselves through our representatives but by officials who are responsible to no electorate: unless, in short, we are disposed to revise the whole theory and practice of the constitution which has so long been our boast: unless we are prepared to go thus far, then what is most urgently needed, and what is in no sense beyond practical possibility, is to make administrative power as responsible *de jure* as it is efficient *de facto*. And this we believe will be done only by means of a wholesome body of administrative law developed in harmony with the traditional principles of the general law system."<sup>12</sup>

Meantime, administrative law, despite the denials of its existence, despite its critics, and despite its obvious defects, has almost usurped the legal stage, much to the distress of the actors of the older order. Not that it burst upon the stage unannounced; as

long ago as 1887-1888 Maitland, in lecturing on constitutional history, said:

"If you take up a modern volume of the reports of the Queen's Bench Division, you will find that *about half the cases reported have to do with the rules of administrative law*. . . . Now these matters you cannot study here; they are not elementary, they are regulated by volumes upon volumes of Statutes. Only do not neglect their existence in your general conception of what English Law is. If you do you will frame a false and antiquated notion of our constitution. . . . The governmental powers, the subordinate legislative powers of the great officers, the Secretaries of State, the Treasury, the Board of Trade, the Local Government Board, and again of the Justices in Quarter Sessions, the Municipal Corporations, the Guardians of the Poor, School Boards, Boards of Health, and so forth; these have become of the greatest importance and to leave them out of the picture is to make the picture a partial one-sided obsolete sketch." <sup>23</sup>

It is characteristic of the genius of the foremost English legal historian of the nineteenth century that, in discussing the subject and criticizing the earlier definitions of Austin<sup>24</sup> and of Holland,<sup>25</sup> he perceived that the inevitable trend of modern society necessitated the creation of new agencies, with scope and power quite foreign to the traditional institutions.

It is to American scholars, however, that the credit for the investigation, analysis, and presentation of the principles of administrative law, simultaneously with their development in actual practice, must go. The pioneer work has been done, by and large, by three men, successively—Goodnow<sup>26</sup> of Columbia, Freund<sup>27</sup> of Chicago (himself a student under Goodnow), and Frankfurter<sup>28</sup> of Harvard—and their disciples. Goodnow was the first to perceive the peculiar significance for the study of administrative law of the comparative method as applied to the administrative systems of France, Germany, England and the

United States, which, although involving common problems, also present sharp contrasts at many vital points. While he recognized, as few have, the inseparability, in both the study and practice of the science of administration, of politics and law, his approach to the subject was predominantly that of the political scientist (and, significantly, most of his distinguished disciples are political scientists).<sup>19</sup> Where Goodnow viewed administrative law from the standpoint of the State, Freund, on the other hand, was concerned primarily with the effect of administrative action on private rights; in his writings, moreover, due doubtless to his Continental background, he has stressed the importance of legislation in its bearing on administrative law. Frankfurter and his school, with the exception of Dickinson,<sup>20</sup> have contented themselves in the main with intensive studies of particular agencies or problems rather than general treatises.<sup>21</sup> In their casebooks, however, Frankfurter and Davison have emphasized the constitutional aspects of administrative law, indicating the parallel course of the development of administrative law in the several English-speaking countries notwithstanding their varied constitutional backgrounds. Indeed, this emphasis on the relation of administrative law to constitutional law, which was criticized in some reviews of the first edition of their casebook, is now, in the light of the recent opinions of the United States Supreme Court construing New Deal legislation, hailed in reviews of the second edition as prophetic foresight.<sup>22</sup>

Nor are these three leaders and their disciples alone in contributing to the growing literature of the subject. Eminent lawyers,<sup>23</sup> bar associations,<sup>24</sup> law-school reviews,<sup>25</sup> and the publications under the auspices of the Commonwealth Fund and the Brookings Institution have carried on their work in this country, while in England there have appeared, among others, the scholarly works of Port, Robson,<sup>26</sup> and Allen. But although in no other



field of legal research have so many significant studies been published in recent years, nevertheless it must be confessed that the literature on the subject has scarcely kept pace with its development in practice during the World War and the great depression, both of which have served to accentuate and accelerate the forces that have been building up administrative law for at least a half century.

In fact, even law schools have not been alive to the challenge presented to the old order by the spread of administrative law. In the eighty law schools belonging to the Association of American Law Schools only forty gave courses in the subject in 1934,<sup>27</sup> and most of these courses were elective or postgraduate, interesting a select but numerically negligible group. Signs are not wanting of a general realization on the part of lawyers of the growing practical importance of the subject—the illuminating reports of the Special Committee on Administrative Law of the American Bar Association under the able leadership, successively, of Mr. Louis G. Caldwell and Colonel O. R. McGuire have contributed much to the general enlightenment<sup>28</sup>—and the impact of this trend, when it is ultimately felt in the law-school curriculum, will doubtless have far-reaching effects not only in its scope but also in methods, for administrative law is not to be mastered, as Goodnow has demonstrated, without its being properly related to politics or without liberal comparison with systems of administration in foreign countries having similar problems. It is not to be grasped, as Frankfurter has shown, apart from the issues of constitutional law and public law in general. And, as Freund has proved, it is inseparably involved in problems of legislation. Finally, inasmuch as administrative law so largely represents the attempt of the State to adapt its rules and regulations to the complicated and changing economic and social conditions of modern life, it cannot be studied in a legal vacuum, without due regard to

the economic and social problems that have generated it. It may be that an intuitive apprehension of these interrelationships has been one of the elements retarding the reception of administrative law by lawyers in general in a period while it was developing all around them, or its acceptance in the law schools as anything but an exotic subject of study. Lawyers and law teachers alike cannot easily give up their age-old intellectual habits of seeking all wisdom in the volumes of decisions reported in the English language, of provincial indifference toward the way other nations have solved similar problems, of a peculiar sort of unspoken contempt for legislation as a type of inferior law until such time as it shall have been construed by the courts, and of reluctance to apply the disciplines of economics and sociology to legal problems. By forcing a change in attitude with reference to these matters on law teachers and prospective lawyers alike, the inevitable reception of administrative law by the law schools into a proper place in the curriculum will have repercussions in legal methods and habits of thought reaching far beyond the limits of the course in administrative law itself.

## II

What is the source of this rising tide of administrative law? The answer is simple—legislative enactments to meet the demands of a new era of unparalleled change and of increasing complexity in business and society. Our widening grasp of science and its growing application by means of new inventions, such as the automobile, the airplane, and the radio, to the problems of communication, transportation, and industry have produced a host of new economic, social, and governmental problems, requiring expert knowledge and technical skill for their solution, which the legislature has believed could best be obtained through administrative agencies. Manifestly, a popu-

larly elected legislature is not equipped to handle such involved and technical problems: hence "the hegemony of the executive," as Dean Pound has termed it. These problems, moreover, are in most instances continuing problems, and, therefore, the legislature has found it necessary to give its newly created instrumentalities power not only to carry out the law creating them but also, in varying degrees, to legislate and adjudicate with reference to it.

In this way the executive branch of the government has over the past hundred years, at first almost imperceptibly but in the last fifty years with constantly accelerating speed (and particularly during the period of the World War and the ensuing depression), been endowed by the legislature with a vast agglomeration of agencies, boards, bureaus, commissions, corporations, courts, and departments, many of them vested with the broadest sort of legislative and judicial powers, all within the scope, of course, of the acts creating them. The number of these administrative agencies to which an individual citizen is subject in his municipality, state, and nation is legion. The list of such instrumentalities exercising judicial functions in the federal government alone covers several pages in the report of the Special Committee on Administrative Law of the American Bar Association for 1934.<sup>29</sup> If it is difficult to catalogue these activities in the federal government, the task is impossible in the forty-eight states. Entire volumes have been written describing the relation of government and business.<sup>30</sup> The modes of control are of such various types as (1) investigations and reports, (2) restrictions on entry into business, (3) fixing of prices and rates, (4) regulation of services and quality, (5) prevention of discrimination, (6) outlawing of monopoly and restraint of trade, (7) elimination of unfair methods of trading, (8) governmental aid to business, (9) governmental ownership and operation.<sup>31</sup> Many

businesses are subjected to multiple control not only by federal agencies but also by the administrative bodies of the several states. The administrative process, as Maitland pointed out nearly fifty years ago, is not new;<sup>32</sup> it is merely the extension of its application to a rapidly changing and vastly complicated social order that is startling.

In their practical operation these administrative agencies run counter to long accepted principles of government and jurisprudence. Thus, in the field of government, the doctrine of the separation of powers epitomizes the struggle of Englishmen against royal tyranny, running over centuries and leading ultimately to a recognition by the king of the supremacy of Parliament in the matters of legislation and taxation, and of the independence of the judiciary as against both king and Parliament. The doctrine evolved from these struggles, as rationalized even to the extent of misinterpretation by Montesquieu,<sup>33</sup> has not only been accepted as a cardinal principle of American constitutional law but has been relied upon from our earliest days by the thirteen original states as a fundamental and indispensable bulwark against despotism. The constitutions of six states prescribe a simple distribution of the powers of government into three departments, legislative, executive, and judicial; in six other states there is added a prohibition of any admixture of powers; the constitutions of twenty-six states provide for a threefold distribution of powers with designated exceptions; eight states, along with the United States, have no explicit separation of powers, but it is implied from the division of all governmental powers into three separate articles; two states provide for an administrative branch in prescribing the separation of powers.<sup>34</sup>

No principle of constitutional law has been more firmly rooted by tradition as well as by express provision. Each of the thirteen Colonies had been governed by Great Britain through a gover-

nor, a legislature, and courts, each with such powers as Parliament decreed. No idea of government was so unanimously accepted by the Founding Fathers.<sup>35</sup> Washington, in his Farewell Address, warned: "The spirit of encroachment tends to consolidate the powers of all departments in one, and thus to create, whatever the form of government, a real despotism." John Adams reasoned: "It is by balancing each of these three powers against the other two, that the efforts in human nature toward tyranny can alone be checked and restrained and any degree of freedom preserved."<sup>36</sup> Jefferson was of the same mind: "The concentrating these in the same hand is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not a single one. One hundred and seventy-three despots would surely be as oppressive as one."<sup>37</sup> Madison was equally emphatic: "The accumulation of all powers, legislative, executive and judicial, in the same hands, whether of one, a few, or many, whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny."<sup>38</sup>

Notwithstanding this unanimity of constitutional provisions, tradition, and interpretation by the Founding Fathers, the fact remains that our government today is largely a government of administrative agencies, many of them exercising powers legislative or judicial in their nature. Here is one of the fundamental problems of administrative law under our written constitutions sanctioning the doctrine of the separation of powers. The problem divides itself into two important phases: (1) the extent to which the legislature may delegate its powers to the executive department, and (2) the extent to which it may endow administrative agencies with judicial powers. Though the two questions have aspects in common, they will be considered separately.

If the legislature were to commit all lawmaking powers to the

various administrative agencies, which Lord Chief Justice Hewart has asserted is the aim of the bureaucrats,<sup>39</sup> representative government would become a mere form or even a farce. On the other hand, if the doctrine of the separation of powers were pushed to extreme limits, government, especially under modern conditions, could not function.

The problem has been with us from the days of Chief Justice Marshall. Thus in *Wayman v. Southard* he held:

"It will not be contended, that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . .

"The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." <sup>40</sup>

As the scope of delegated legislative and judicial power broadened, the courts often sought to conceal the clash of constitutional mandate and governmental necessity by describing the delegated powers as "quasi-legislative" or "quasi-judicial." Notwithstanding the hybrid term, the powers conferred, not being executive, manifestly were either legislative or judicial. The extent to which the process of conferring other than executive powers on administrative agencies has been carried has been summarized by Justice Holmes in his dissenting opinion in the *Springer* case:

"The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with the help of a phrase [the police power] some property may be

taken or destroyed for public use without paying for it, if you do not take too much. When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on.

"To make a rule of conduct applicable to an individual who but for such action would be free from it is to legislate—yet it is what the judges do whenever they determine which of two competing principles of policy shall prevail. At an early date it was held that Congress could delegate to the courts the power to regulate process, which certainly is lawmaking so far as it goes. *Wayman v. Southard*, 10 Wheat. 1, 42, 6 L. ed. 253, 262; *Bank of United States v. Halstead*, 10 Wheat. 51, 6 L. ed. 264. With regard to the Executive, Congress has delegated to it or to some branch of it the power to impose penalties, *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671; to make conclusive determination of dutiable values, *Passavant v. United States*, 148 U. S. 214, 37 L. ed. 426, 13 Sup. Ct. Rep. 572; to establish standards for imports, *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; to make regulations as to forest reserves, *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; and other powers not needing to be stated in further detail. *Houston v. St. Louis Independent Packing Co.* 249 U. S. 479, 63 L. ed. 717, 39 Sup. Ct. Rep. 332; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Re Kollock*, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444. Congress has authorized the President to suspend the operation of a statute, even one suspending commercial intercourse with another country, *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495, and very recently it has been decided that the President might be given power to change the tariff, *J. W. Hampton, Jr. & Co. v. United States* April 9, (1928) 276 U. S. 394, ante, 624, 48 Sup. Ct. Rep. 348. It is said that the powers of Congress cannot be delegated, yet Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a quasi; makes regulations, *Intermountain Rate Cases* (*United States v. Atchison, T. & S. F. R. Co.*)

234 U. S. 476, 486, 58 L. ed. 1408, 1422, 34 Sup. Ct. Rep. 986, issues reparation orders and performs executive functions in connection with Safety Appliance Acts, Boiler Inspection Acts, etc. Congress also has made effective excursions in the other direction. It has withdrawn jurisdiction of a case after it has been argued. *Ex parte McCardle*, 7 Wall. 506, 19 L. ed. 264. It has granted an amnesty, notwithstanding the grant to the President of the power to pardon. *Brown v. Walker*, 161 U. S. 591, 601, 40 L. ed. 819, 822, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644. A territorial Legislature has granted a divorce. *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723. Congress has declared lawful an obstruction to navigation that this court has declared unlawful. *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 421, 15 L. ed. 435. Parallel to the case before us Congress long ago established the Smithsonian Institution to question which would be to lay hands on the Ark of the Covenant; not to speak of later similar exercises of power hitherto unquestioned, so far as I know.

"It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires." <sup>41</sup>

This trend toward delegated legislative power has been thought to be irresistible. As long ago as 1916, Senator Root expressed the opinion that "Before these [administrative] agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."<sup>42</sup> But the decisions of the United States Supreme Court in the recent *Panama Refining Company*<sup>43</sup> and the *Schechter*<sup>44</sup> cases demonstrate the rashness of prophecy. In the first case, Chief Justice Hughes said:

"The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall



consist of a Senate and House of Representatives'. Art. I, Sec. I. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. I, Sec. 8, par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." <sup>45</sup>

In the second case, where there was no dissenting opinion, the Chief Justice reiterated:

"To summarize and conclude upon this point: Sec. 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, Sec. 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in Sec. 1. In view of the scope of that broad declaration and of the

nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power." <sup>46</sup>

While Congress cannot be expected to legislate in detail on complicated or technical matters, it cannot abdicate its powers. It must at least prescribe policies and establish standards. A halt has been called on the wholesale, unconsidered delegation of legislative powers to the executive. It is now for the Court to determine in each instance of delegated powers whether or not policies have been prescribed and standards set up; and it seems reasonable to suppose that the decision of the Court in each instance will ultimately involve a consideration of governmental necessity on the one hand and of the traditions of our people and the purposes dictating the doctrine on the other hand.

It is interesting to note how the British have met the same problem. Under an unwritten constitution, no appeal is possible to the doctrine of the separation of powers; what Parliament enacts is law. In a few instances, statutory construction served to block the surrender by Parliament of legislative power. It soon proved an ineffectual control. So, to quote C. T. Carr:

"At length the alarm was sounded. In 1929 the Lord Chief Justice 'left the Bench'—the words are those of Professor Frankfurter— 'to break a lance for the pristine purity of Dicey's Rule of law.' Shortly before The New Despotism appeared, the Lord Chancellor appointed a strong committee under Lord Donoughmore to investigate the legislative and judicial powers of Ministers and to report upon safeguards 'to secure the constitutional principles of the Sovereignty of Parliament and the Rule of Law.' Thus the Dicey tradition was reaffirmed. The committee obtained charts of all departments' statutory powers, and

it heard valuable evidence from the Treasury Solicitor, the senior official draftsman, the Ministry of Health (most prominent of Whitehall legislators and quasi-judges) and other witnesses. Its Report, a happy blend of sound learning with practical wisdom, was a State document of high authority. In one sense the civil service had been on trial. The verdict was 'not guilty, but be careful another time.' " 47

The findings and recommendations of this report<sup>48</sup> constitute it an extremely valuable state paper, which may be of great utility in considering our own problems under written constitutions. The conclusion of the Committee that the practice of delegating legislative power was inevitable holds for us as well.

Thus, under both written and unwritten constitutions the development of administrative agencies, designed to meet the necessities of modern life, has modified the doctrine of the separation of powers almost beyond recognition. The plain truth is that the doctrine in its absolute form never was workable.<sup>49</sup> It has never been regarded, for example, as applicable to local government.<sup>50</sup> And, as we have seen, exceptions on one basis or another have been made from the earliest times in the interest of efficient government.

One practical problem, of great importance to every one who has had to deal with administrative agencies exercising delegated legislative powers, is to learn what legislation they have promulgated. Statutes are readily accessible, but this "subordinate legislation" has often been quite inaccessible.<sup>51</sup> The situation was most acute in the period of the National Recovery Administration codes. As a result largely of the work of the Special Committee on Administrative Law of the American Bar Association,<sup>52</sup> Congress in 1935 enacted the Federal Register Act.<sup>53</sup> It provides not only for a central office giving access to the public to all administrative legislation but also for the publication, five times a week,

of a *Federal Register*, the first number of which appeared on March 14, 1936. This Act has set a standard for the several states in which the discovery of delegated legislation is still all too often an arduous task.

### III

The vesting of judicial powers in administrative agencies not only involves the political and constitutional aspects of the doctrine of the separation of powers, but also raises a question in the sphere of jurisprudence on the validity of our definition of law.

Every exercise of judicial authority by an administrative instrumentality is necessarily a breach of the strict doctrine of the separation of powers and, therefore, to be scrutinized accordingly. When legislative powers are joined, as they frequently are, to a grant of judicial powers, we have the merger in one person or in one body of all three types of governmental power, the very source of tyranny and despotism that Washington, Adams, Jefferson, and Madison were seeking to avoid. The judicial power raises much graver problems than the legislative; relatively little is to be feared from an abuse of the lawmaking power, for if it overreaches itself public opinion will sooner or later correct it. It is not so with the judicial power; if the law or administrative ruling is not uniformly enforced, justice vanishes. There is always this danger when one man or one body is legislator, prosecutor, judge, and enforcing agent. The danger is not academic; the United States Supreme Court has taken judicial notice of the environment of the administration. In the recently decided *St. Joseph Stock Yards Company* case, Chief Justice Hughes said:

"Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient."<sup>54</sup>

In England, where, as we have seen, under an unwritten constitution the doctrine of separation of powers has no force, the Rule of Law was invoked by Dicey as a substitute. It meant, first, that no man should be called to judgment except in the ordinary courts, and, secondly, that every man, regardless of position or rank, was subject to the ordinary courts of law.<sup>55</sup> "Law," according to Pollock and Maitland, "may be taken for every purpose, save that of strictly philosophical inquiry, to be the sum of the rules administered by courts of justice."<sup>56</sup> The juridical definition of law and the constitutional theory of the Rule of Law alike have been overwhelmed by the rising tide of administrative law. As Chief Justice Hughes frankly said:

"The distinctive development of our era is that the activities of the people are largely controlled by government bureaus in state and nation. It has well been said that this multiplication of administrative bodies with large powers 'has raised anew for our law, after three centuries, the problem of executive justice'; perhaps better styled administrative justice. A host of controversies as to private rights are no longer decided in courts."

Nevertheless, in spite of the retreat in the United States of the doctrine of the separation of governmental powers before the necessities of modern life, in spite of the overthrow in Great Britain of the Rule of Law as enunciated by Dicey and as accepted generally by Englishmen for half a century, the struggle to maintain the advantages of judicial independence with administrative efficiency has continued and still continues.

Robson has summed up admirably the advantages of administrative tribunals:

"the cheapness and speed with which they usually work; technical knowledge and experience which they make available for the discharge of judicial functions in special fields; the assistance which they had to

the efficient conduct of public administration and the ability they possess to lay down new standards and to promote a policy of social improvement"<sup>57</sup>

as well as their disadvantages:

"the lack of publicity which attends the work of most tribunals, the air of mystery and secrecy in which their deliberations are shrouded, the failure in most cases to give reasons for the decisions, or to publish reports of decided cases; and the poor quality and insufficient amount of the evidence on which decisions are often based."<sup>58</sup>

The chief objection to the most important administrative agencies exercising judicial functions is the combination of prosecutor and judge. In actual practice, the administrative body may prescribe the regulations; employ inspectors to enforce them; file complaints against offenders in the language of an outraged plaintiff; ascend the bench, try the cases for violation of the regulations it has made, decide them on the basis of the testimony of inspectors it employs; and, where it files an opinion, sustain in the strictest judicial language the charges it has preferred in the language of an outraged plaintiff.<sup>59</sup> Worse than that, the counsel to the administrative tribunal, who assisted in drafting the regulations and the complaint and in preparing the case for trial, will in most cases confer with the administrative officers trying the case, either openly or secretly, daily before the opening of court, during the noon recess, and after court, regarding the proof to be adduced at the hearing; he will participate in the deliberations of the tribunal leading up to a decision, if, indeed, the duty of decision is not in fact delegated to him, and he will write the decision of his tribunal. In short, counsel may in fact occupy every position in the controversy except that of defendant and witness and even then he will be close to the witness on the commission's pay roll.

Although there is no decision of the federal courts prohibiting the combination of judge and prosecutor, the entire proceeding is alien to the spirit of Anglo-American law. The Donoughmore Committee reported that "The first and most fundamental principle of national justice is that a man may not be a judge in his own cause,"<sup>60</sup> and again that "We think it clear that bias from a strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest."<sup>61</sup> Here, again, as in the field of delegated legislation, we find ourselves confronted with practical difficulties. The issues raised in judicial proceedings before administrative tribunals are often technical and complicated, utterly foreign to the experience of already overworked judges. The attitude of Lord Campbell, then chief justice, later Chancellor, is summarized by C. T. Carr:

"There was one Chief Justice who wanted no administrative adventures in a field where the lawyer's training and precedents gave no guidance. The Railway and Canal Traffic Act, 1854, referred traders' complaints to the Court of Common Pleas which was to school the railway companies with injunction and fine. Lord Campbell protested that the proposals would turn judges into railway directors; they would have to be apprenticed to civil engineers; how was he himself to determine what was a reasonable fare or what was undue delay? His view that these were matters for a lay tribunal and not for judges was justified later when a Joint Select Committee reported that a jurisdiction 'so foreign to the ordinary functions of a Court of justice' had failed to work."<sup>62</sup>

While Lord Campbell's statement may explain the reluctance of the judiciary to venture into new and uncharted fields, still it is difficult to explain to a litigant why an appellate court will review both the findings of facts and the conclusions of law of a trained equity or admiralty judge but decline to review the findings of facts of administrative tribunals composed in many in-

stances of laymen untrained in the law of evidence and unskilled in the art of weighing the probative value of testimony. In most litigation the vital dispute is about the facts; as Chief Justice Hughes has said:

"The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence. An unscrupulous administrator might be tempted to say 'let me find the facts for the people of my country, and I care little who lays down the general principles.'"<sup>63</sup>

Despite these obvious considerations, the natural reluctance of judges to venture into new fields and the lip service rendered to the doctrine of the separation of powers by designating the judicial functions as "quasi-judicial" have conspired to limit the right of judicial review of administrative decisions. Space is lacking to trace the course of the limitations placed by courts on judicial review. In the recently decided *St. Joseph Stock Yards Company* case, the Supreme Court, speaking through Chief Justice Hughes, has shown an appreciation both of the importance of the power to review findings of fact where a constitutional question is involved and of the burdens such an obligation imposes on the Court:

"But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limita-



tion by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, as to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.

"That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged. The question under the Packers and Stockyards Act is not different from that arising under any other act, and we see no reason why those decisions should be overruled."<sup>64</sup>

But even with this advanced position, pointing toward an effective protection of the real rights of the litigant where constitutional issues are involved, the general status of the law of judicial review is most unsatisfactory. This has led to the advocacy by the Special Committee on Administrative Law, influenced to a degree by the same considerations as dominate the Donoughmore Report, of a Federal Administrative Court;<sup>65</sup> the Logan bill,<sup>66</sup>

designed to create such a court, is now pending in Congress. It is impossible here to discuss the bill in detail. It represents a monumental advance in the handling of administrative adjudications. The present trained judges of the Federal Court of Claims, and the Court of Customs and Patent Appeals, and the members of the Board of Tax Appeals are transferred to the new court. Otherwise, the judges are appointed as are other federal judges, and they likewise hold office during good behavior. The court has both trial and appellate divisions. The appellate division reviews all issues both of fact and of law. It may take additional testimony. Its decision is final, subject to review by the Supreme Court by writ of certiorari. Sessions of the trial division may be held anywhere in the United States. The bill, in short, has sought to preserve the separation of powers within the administrative branch of the government and at the same time to safeguard the administration by leaving the power to adjudicate in expert hands.

#### IV

No review of the development of administrative law would be complete without pointing out the deficiencies of our Anglo-American system in affording adequate relief to the citizen against wrongs done him by the government and its officers. One hundred years ago, in a simpler age, the subject was relatively unimportant. With the constant growth of all governmental activities—municipal, state, and national—both through regulation of industry and through direct participation in business, the problem presented is of such significance to the citizen that it cannot be ignored. Lord Hewart and C. K. Allen<sup>67</sup> have exhibited conspicuous examples of wrongs deliberately inflicted by the government without redress to the subject; they might be paralleled by many examples in this country.

The maxim that the king can do no wrong or its American

substitute, the doctrine of the nonsuability of the State, has prevented actions against the government without its consent. The Rule of Law, on the other hand, with its principle of equality before the law, has made every officer, whatever his position, responsible for his own acts; he cannot plead that he acted at the command of his superior. The citizen may sue the officer who has wronged him personally (a doubtful remedy in any case) if the officer's act is ministerial, but if the officer's act is discretionary and he has acted within the limits of his jurisdiction he is not liable in many cases. The citizen may then petition the legislature not as a matter of right but *ex gratia* (a still more doubtful source of relief).

In striking contrast, in France and elsewhere on the Continent *droit administratif* is invoked whenever a government officer is accused of wrongdoing. An action is permitted in a special administrative court, with ultimate resort to the *Conseil d'État*, a special court of appeals. While Dicey and Englishmen generally were shuddering at *droit administratif* as a foreign instrument of tyranny, these courts were actually protecting French citizens from their officials.<sup>68</sup>

Some relief has been afforded—in this country through the Federal Court of Claims and similar courts in a few states, such as New York, Massachusetts, and Illinois, and in England by petition of right to the Home Secretary.<sup>69</sup> But in each instance the jurisdiction is limited; for example, there is no liability for torts. In England the warnings of the Donoughmore Committee and of such an eminent judge as Lord Justice Scrutton have gone unheeded.<sup>70</sup> In most of the states of the Union vastly increased powers of the administrative branch have failed to provide any corresponding remedies for relief of wrongful governmental action. This evil cannot persist indefinitely; sooner or later we will reach the point where the state itself will be obliged to live

up to the standards it imposes on its citizens. When that point is reached, we will have much to learn from foreign experience with *droit administratif*.

## V

A movement which has had the power to twist and bend, if not to break, our strongest doctrines of constitutional law, of political theory, and of jurisprudence, grounded as they are in our national character with our traditional fear of tyranny and our love of individual liberty, presents problems that, manifestly, call for the highest type of statecraft on the bench, in the legislatures, at the bar, and in our universities. It is one of the hopeful signs of the times that these questions are being approached, in the main, with a forward look, with regard to facts as we find them, with freedom from partisanship, and with a due appreciation of their far-reaching importance.

## NOTES

<sup>2</sup> AUSTIN, PROVINCE OF JURISPRUDENCE (1832); AUSTIN, LECTURES ON JURISPRUDENCE (1861-1863) 73.

"The law of political conditions, or public law (with the strict and definite meaning), is frequently divided into constitutional and administrative.

"Administrative law determines the ends and modes to and in which the sovereign powers shall be exercised: shall be exercised directly by the monarch or sovereign number, or shall be exercised directly by the subordinate political superiors to whom portions of those powers are delegated or committed in trust.

"The two departments, therefore, of constitutional and administrative law, do not quadrate exactly with the two departments of law which regard respectively the status of the sovereign, and the various statuses of subordinate political superiors. Though the rights and duties of the latter are comprised by administrative law, and are not comprised by constitutional law, administrative law comprises the powers of the sovereign in so far as they are exercised directly by the monarch or sovereign number."

This definition has been justly criticized by Port, in ADMINISTRATIVE LAW (1929), at 5:

"The criticism which can be justly levelled against Austin's definition of Administrative Law is that it does not recognize the overlapping of the province of Administrative Law into that of Constitutional Law as essential in the nature of things, but treats it rather as accidental. To attempt to divide up the whole territory of law into self-

contained superficial areas of which one is Administrative Law appears to be wrong in so far as the latter is, as it were, a transverse section which can be discovered in all areas. It cuts across the normal divisions; and for this reason, viz. that all law may need to be put into motion in order to become effective."

<sup>2</sup> The term "administrative law" seems to have been first introduced in the United States by Professor Frank J. Goodnow, *Judicial Remedies against Administrative Actions* (1886-1887) 1 POL. SC. Q. 533; COMPARATIVE ADMINISTRATIVE LAW (1893).

<sup>3</sup> "The hegemony of the executive is at hand. As the eighteenth century and the fore part of the nineteenth century relied upon the legislative and the last half of the nineteenth century relied upon the courts, the twentieth century is no less clearly relying upon administration." Pound, *The Administration Application of Legal Standards* (1919) 44 A. B. A. REP. 445, 446.

"Some of the problems of jurisprudence are being worked out by the extension of another social invention, the administrative tribunal, which often combines administrative, legislative and judicial functions in one body. Thus a health board adopts rules, renders decisions and carries out orders. Administrative tribunals have had a remarkable development without the 20th century and are an adaptation to the changing conditions. Their success argues for their further development, but they offer a solution for only a phase of the lag of the law." *Recent Social Trends in the United States* (Report of the President's Research Committee on Social Trends) lxvi.

<sup>4</sup> DICEY, LAW OF THE CONSTITUTION (1885).

<sup>5</sup> [1915] A. C. 120.

<sup>6</sup> (1915) 31 L. Q. REV. 148.

<sup>7</sup> LORD HEWART OF BURX, *THE NEW DESPOTISM* (1929).

<sup>8</sup> WILSON'S LIFE OF JAMES I (1653) 94, 95, quoted in AMES'S, CASES ON EQUITY JURISPRUDENCE (1901) 5.

<sup>9</sup> LORD HEWART OF BURX, *op. cit. supra* note 7, at 13.

<sup>10</sup> ALLEN, BUREAUCRACY TRIUMPHANT (1931).

<sup>11</sup> PORT, ADMINISTRATIVE LAW (1929) x, 358. "The following is a brief summary of the reforms advocated in this chapter:

#### I. Administrative Tribunals:

- (a) Uniform system of evidence and procedure, with restriction on exercise of prerogative.
- (b) Appeals on all questions of law.
- (c) Institution of Administrative Court of Appeal.
- (d) Publicity of hearing, and publication of decisions.
- (e) All formal tribunals to come under the Lord Chancellor, and not under the relevant Government department.
- (f) Annual report by the Lord Chancellor on the whole system of administrative jurisdiction.

#### II. Delegated Legislation:

- (a) Institution of hybrid Committees of both Houses to scrutinise all Statutory Rules and Orders.

The adoption of these reforms appears to be necessary in order to remedy fundamental defects, and nothing less would meet the needs of the situation adequately."

<sup>12</sup> ALLEN, *op. cit. supra* note 10, at 105.

<sup>13</sup> MATTTLAND, CONSTITUTIONAL HISTORY (1908) 505-506.

<sup>14</sup> *Id.* at 528-532.

<sup>15</sup> *Id.* at 532-536.

<sup>16</sup> GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW* (1893); *POLITICS AND ADMINISTRATION* (1900); *PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* (1905); *SELECTED CASES ON GOVERNMENT AND ADMINISTRATION* (1906); *SELECTED CASES ON THE LAW OF OFFICERS* (1906).

<sup>17</sup> FREUND, *CASES ON ADMINISTRATIVE LAW* (1911; 2d ed. 1928); *STANDARDS OF AMERICAN LEGISLATION* (1917); *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* (1928); *LEGISLATIVE REGULATION* (1932).

<sup>18</sup> FRANKFURTER AND DAVISON, *CASES AND OTHER MATERIAL ON ADMINISTRATIVE LAW* (1932; 2d ed. 1935).

<sup>19</sup> HAINES AND DIMOCK, *ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION, A VOLUME IN HONOR OF FRANK J. GOODNOW* (1935).

<sup>20</sup> DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927).

<sup>21</sup> *Cf.* FRANKFURTER AND DAVISON, *op. cit. supra* note 18 (1st ed.), *Bibliography*, 1151 *et seq.*, esp. 1161-1167.

<sup>22</sup> *Cf.* (1932) 41 *YALE L. J.* 936, 937-938.

<sup>23</sup> Hughes, *Some Aspects of the Development of American Law* (1916) 39 *N. Y. S. B. A. REP.* 266, 269-270; Root, *Public Service by the Bar* (1926) 51 *A. B. A. REP.* 355, 368-371.

<sup>24</sup> *The Growth of American Administrative Law* (lectures by Ernst Freund and others under the auspices of the Bar Association of St. Louis: 1923).

<sup>25</sup> *E. g.*, *A Symposium on Administrative Law* (1923) 18 *IOWA L. REV.* 129-250. The *Georgetown Law Review* is principally devoted to problems in administrative law.

<sup>26</sup> ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* (1928).

<sup>27</sup> Association of American Law Schools, *Directory of Teachers in Member Schools* (1935).

<sup>28</sup> (1934) 59 *A. B. A. REP.* 539; 60 *id.* (1935) at 136.

<sup>29</sup> (1934) 59 *A. B. A. REP.* 556-560.

<sup>30</sup> *E. g.*, HALL, *GOVERNMENT AND BUSINESS* (1934); CHASE, *GOVERNMENT IN BUSINESS* (1935); CRECROFT, *GOVERNMENT AND BUSINESS* (1928).

<sup>31</sup> HALL, *op. cit. supra* note 30, c. 3.

<sup>32</sup> MAITLAND, *loc. cit. supra* note 13.

<sup>33</sup> MONTESQUIEU, *L'ESPRIT DES LOIS*, livre XI, chapitre vi, *De la Constitution d'Angleterre* (1748).

<sup>34</sup> FRANKFURTER AND DAVISON, *op. cit. supra* note 18 (d. ed.), Appendix I; 637-639; BONDY, *THE SEPARATION OF GOVERNMENTAL POWERS* (1896) c. III.

<sup>35</sup> *Id.* at 17.

<sup>36</sup> ADAMS, *WORKS* (1856) 186.

<sup>37</sup> JEFFERSON, *NOTES ON VIRGINIA* (1784) 195.

<sup>38</sup> MADISON, *THE FEDERALIST* (1787-1788) No. xlviii.

<sup>39</sup> LORD HEWART OF BURY, *op. cit. supra* note 7, at 13.

<sup>40</sup> 10 *Wheat.* 1 (1825).

<sup>41</sup> *Springer v. Government of the Philippine Islands*, 277 U. S. 189, 48 *Sup. Ct.* 480, 485 (1928).

<sup>42</sup> Root, *loc. cit. supra* note 23.

<sup>43</sup> *Panama Refining Company v. Ryan*, 293 U. S. 388, 421, 55 *Sup. Ct.* 241 (1935).

<sup>44</sup> *Schechter v. United States*, 295 U. S. 495, 55 Sup. Ct. 834 (1935).

<sup>45</sup> 293 U. S. 388, 421, 55 Sup. Ct. 241 (1935).

<sup>46</sup> 295 U. S. 495, 542, 55 Sup. Ct. 834 (1935).

<sup>47</sup> (1935) 51 L. Q. REV. 61.

<sup>48</sup> (1932) C. M. D. 4060.

<sup>49</sup> GOODNOW, *POLITICS AND ADMINISTRATION* (1900) 14.

<sup>50</sup> GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* (1905) 35.

<sup>51</sup> Cf. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation* (1934) 48 HARV. L. REV. 198.

<sup>52</sup> (1934) 59 A. B. A. REP. 540.

<sup>53</sup> 44 U. S. C. A., § 301.

<sup>54</sup> *St. Joseph Stock Yards Company v. United States*, 298 U. S. 38, 51, 80 L. ed. 1033, 1041 (1936).

<sup>55</sup> DICEY, *op. cit. supra* note 4 (8th ed. 1926) at 183, 189.

<sup>56</sup> POLLOCK AND MATTLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1898) xxv.

<sup>57</sup> ROBSON, *op. cit. supra* note 26, at 275.

<sup>58</sup> *Id.* at 288.

<sup>59</sup> Hon. George T. McDermott in address to University of Chicago alumni, June 11, 1935.

<sup>60</sup> *Op. cit. supra* note 48, at 76.

<sup>61</sup> *Op. cit. supra* note 48, at 78.

<sup>62</sup> (1935) 51 L. Q. REV. 69-70; Parl. Deb. 3d ser. vol. cxxxiii, 1854, May to June, col. 596. See also Lord Summer's speech in *Roberts v. Hopwood* (1925) A. C. 606: "There are many matters which the Courts are indisposed to question; though they are the ultimate judges of what is lawful and what is unlawful to borough councils, they often accept the decision of the local authority because they themselves are ill-equipped to urge the merits of one solution of a practical question against another."

<sup>63</sup> U. S. Daily, Nov. 1, 1930.

<sup>64</sup> *St. Joseph Stock Yards Company v. United States*. 298 U. S. 38 at 51, 80 L. ed. 1033, at 1041 (1936).

<sup>65</sup> (1934) 59 A. B. A. REP. 539, 549-550; (1935) 60 A. B. A. REP. 136-137.

<sup>66</sup> Introduced Jan. 22, 1936 as S.-3787.

<sup>67</sup> LORD HEWART OF BURY, *op. cit. supra* note 7; ALLEN, *op. cit. supra* note 10.

<sup>68</sup> Port, *op. cit. supra* note 1, at c. VII. French *Droit Administratif*.

<sup>69</sup> Petition of Right Act 1860, 23 & 24 VICT. c. 34; Administration of Justice (Miscellaneous Provisions) Act, 1933.

<sup>70</sup> "I personally feel that the whole subject of proceedings against Government departments is in a very unsatisfactory state. I feel that it is of great public importance that there should be prompt and efficient means of calling in question the legality of the action of Government departments which, owing to the great national emergencies arising out of the war, have been inclined to take action that they considered necessary in the interests of the State without any nice consideration of the question whether it was legal or not, and I hope that the committee which is now considering the proceedings against the Crown will be able to give the subject more effective remedies against Government departments than he has at present." Quoted in ALLEN, *BUREAUCRACY TRIUMPHANT* (1931) 19.

## THE PROFESSION OF LAW: ITS PRESENT AND FUTURE

WILLIAM L. RANSOM

THIS is a time when many or most American lawyers are thinking rather intensely about their profession as well as their country. The younger men are confronted with problems of placement and opportunity, after long years of struggle to survive the requirements of pre-legal education and schooling in the law, and then to run the gauntlet of bar examinations and committees on character and fitness. Not a few of the older men, trained lawyers who once had an active and fairly remunerative practice, are confronted with the tragedy that the whirl of the wheel has brought decrease or disappearance of their volume of law business during the years when they are most capable of rendering competent and honorable service. Even for those who have moved forward to a reasonably stabilized success in their profession, the times and the conditions have brought a good deal of challenge and uncertainty, as well as questioning on what lies ahead by way of future for a profession so predisposed to sound the tocsin of alarm and fling itself in the way when drastic social, economic, and governmental changes are proposed. There is a deepening conviction that in some way the future of the profession of the law is bound up with the future of government by law and of liberty and justice according to law, and that the future of the profession is menaced by the conditions confronting America and the world.

I am so bold as to put to paper some random or rambling impressions of the American lawyer and of his profession. Of course, I have no crystal ball from which the future of the pro-



fession can be foreseen and forecast. The subject is one on which it is difficult, and even dangerous, to generalize, because conditions vary so widely, and so many crosscurrents are at work, in different parts of the United States. I can put down only the impressions I have formed from what I have seen. Due to circumstances not beyond my control, in July of 1935 I turned aside, to a considerable extent, from a rather busy practice, to devote a year in large part to the work of the American Bar Association. During the past twelve months, I have been in many cities and states, in virtually all parts of the country, and have spent a great deal of my time with lawyers, in and around their home meetings and in their home towns. I went into office with no theories and no blueprints for remaking the organization of the bar or changing the activities of the profession, and I have none now. Whatever was done or proposed during that year was worked out in the laboratory of experience and put through the same hard mill of reality as any of the work which lawyers do for clients, and was formulated with the active aid and approval of a large part of the profession.

#### CHANGES THAT HAVE ALREADY TAKEN PLACE

When we survey the American scene today and mark out the position of the lawyers, we cannot escape the conclusion that marked change has already come about, from the early days, concerning lawyers, the law, and the administration of justice. The profession has been under criticism and attack from the first; the present manifestations are neither new nor surprising, and are not likely to abate at any time that can now be forecast.

Gone are the days of "the sporting theory of justice," when cunning was a quality more prized and sought for, in lawyers, than a sense of fair play and of accountability to the public needs and standards of the time. Gone also are the conditions of practice

described so graphically by Charles Warren, Albert J. Beveridge, and others who have written of the early history and of the pioneer leaders of the American bar. The ethics and the tactics of "line-fence" lawsuits no longer pervade the bar. Gone also, for the most part, we must say with some regret, is that race of rugged individualists, leonine figures of the bar, products of generations during which courts permitted oral arguments and the issues of each case were presented by counsel to the court rather than by the court to counsel in the form of questions. What has been lost in the arts of sustained advocacy and in the picturesqueness of the personalities dominating the earlier profession has, perhaps, been compensated for in new arts of directness, precision, pride of workmanship, fairness, and adaptation to the complex and changing conditions of today.

#### PRESENT ASPECTS OF THE PROFESSION

In visiting American lawyers at home and at work throughout the country, the conclusion is likely to be that, on the whole and at first impression, the profession is getting along and is doing fairly well, at least as compared with other professions and vocations. Lawyers are likely to keep up a good appearance and make a good showing even when the going is hard and rough. When one gets below the surface of things, particularly in the largest cities, there are many instances of hardship and heartache by no means confined to those who have come recently to the bar. The most encouraging thing about the whole picture is a rapidly developing realization that it is high time that lawyers did some serious thinking about their profession—the same kind of thinking for themselves that they do for their clients. Lawyers are coming to face the fact that individuals, young or old, cannot do much to cope with the conditions, and that action by the whole profession, through effective organization, offers the only

hope and promise of advance. I am truly encouraged by the widening realization that something is expected of the legal profession which it is not completely fulfilling; that lawyers should think of their profession as a whole, within each state, and not merely as a lot of individuals practising law; and that lawyers should think of their work as that of a profession and not merely as a means of livelihood, and should accept and fulfill the responsibilities of a profession regarding its members and the public.

A prerequisite to understanding the situation seems to me to be an appreciation that the legal profession in America is not made up of the lawyers in the largest cities, and that the future of the profession and the country will not depend on the largest cities or on the lawyers in them. In a great city like New York, many of us become discouraged, at times, about the present and future of lawyers—the overcrowding of the profession, the difficult conditions under which lawyers live and practise, the entrance to the profession of many who lack its standards and background, the submergence of individuals as leaders and the emergence of great firms, the absence of a unified professional spirit and ideals. We have to face the fact that we do not practise law here under typical American conditions, and that the average lawyer in the largest cities does not occupy anything like the usual relationship to his community.

The more typical American lawyer, as I have observed him, is very much a part of the life and work of his community. He owns his home and usually a little land, may walk to his office, knows by first name the people he meets along the street, knows the men with whom he practises law, has a feeling of independence in spite of moderate fees and slow collections, and is called upon to sit at the council table of every community project. He has time to read a little, play a little, and think a good deal. He takes part in the public affairs and politics of his town, sits in its

school board, is active in its churches and lodges, is identified with its banks and industries, knows its people, and is all the while called upon for judgment on its problems and for leadership in its public opinion, cultural life, and community activities. His relationship to all these things is individual and personal, and he becomes the greatest individualist in America. He does not surrender his opinions to clients or political parties or bar associations; he thinks and speaks and acts and votes as he individually sees fit, and is generally a most useful and respected citizen who has and deserves the confidence of his community as well as of his profession; and lately he has shown, in not a few states, a willingness to deal with the problems and duties of his profession as a whole.

I do not for one moment suggest that, in any part of this country during the past few years, the life and work of lawyers as a class have been or should be any "bed of roses" or that the highest ideals of the profession have anywhere been completely realized; but I do suggest that we would not worry about the future of the legal profession in the United States if it were left to the smaller cities and towns of this country and were not dictated by the conditions of life and practice in the few largest cities.

#### CHANGING CONDITIONS CONFRONT

##### THE INDIVIDUAL LAWYER

After all, it is the individual lawyer, the average lawyer, with whom and for whom we are concerned in this era of transition. Bar associations exist for the lawyer—not the lawyer for bar associations. In each state and in many cities, we of the legal profession become greatly agitated and aroused because of the particular situations that confront us. We think that they are unusual and severe. This is especially a time when we ought to

try to see the picture as a whole, see clearly its implications, and take counsel with each other regarding what we should try to do along practical lines. The first thing we need to do is to comprehend that the conditions which alarm us are not confined to any one state, or to any one section of the country, or even to our own country, but may be a manifestation of world-wide moods and trends that need to be understood and resisted.

At a time when transition or worse is in the air, the lawyer is likely to find that a great deal of challenge and anxiety confronts both him and his profession. The extent of the disturbance and distress which befalls him, individually and as a member of the profession of law, depends for the most part upon the severity and scope of the economic and political upheavals that take place. The fate of lawyers and the legal profession in other countries in recent years is warning that arbitrary and unchecked powers in the hands of government may crush and destroy our profession as we have known it and as those countries had long known it. In our own country, the signs are not few that there are perils ahead for our profession and for the individual lawyer; and already the dislocations of life and business have brought very real distress to not a few lawyers who have deserved better fortune.

That too many lawyers have been admitted to the bar, without sufficient cultural and professional training and ethical background, and that the increase in the number of lawyers exceeds any increase in the volume of law business and available fees therefrom, there can be no fair doubt. That lay agencies have invaded the field of work of the legal profession and taken away a considerable volume of work hitherto performed by lawyers, particularly the younger lawyers, there can be no fair doubt. That the moods and habits of the times have decreased the volume of

litigation in many fields is likewise a matter of common knowledge.

#### FUNDAMENTAL HAZARDS TO THE PROFESSION

Factors such as these have decreased the opportunities and the volume of useful employment of many lawyers, but I think that the real causes, the greater hazards to the average lawyer, go far deeper. It is a superficial observation, often heard, that the vast multiplication of laws, regulations, taxes, and administrative rules and requirements have created a great new volume of law business, which should keep lawyers busy and prosperous for years to come. That may be true for some lawyers and law firms, but I doubt if it holds out rich rewards or economic salvation for the great majority of lawyers.

The fact of the matter appears to be that, looking at the over-all picture, the now prevalent trend of the times is away from law and impartial justice as to the method of determining what men may and may not do, and is toward administrative discretion, personal or political favor, and concepts of doing this or that to aid classes of people or to right supposed inadequacies of their stations in life. In the long run, the success and well-being of the average lawyer depend upon the activity of private business in his community, the manufacture and exchange of goods, the prosperity of the enterprises of his community and of the surrounding agricultural country. When arbitrary discretion or favoritism is substituted for law and when certainty of rights gives way to uncertainty about what some remote and unknown bureau or official will permit or forbid, business stagnates and enterprise is at an end. The lawyer and his volume of law business are not likely to gain by the increasing ascendancy of arbitrary power and discretion. The same remote hand which paralyzes

the free spirit and boundless energy and independence of the American business man and farmer is likely to leave the road increasingly hard for the average lawyer.

Nor is this all. The American lawyer has traditionally been the aid and servant of private enterprise. As government comes into the picture and takes over many of the functions of financing and of business and even enters into competition with its own citizens, there is less of a place for the independent lawyer in such transactions. The government wishes to transact the necessary law business on a "mass-production" basis, usually through its political appointees, or else to place all manner of restrictions and limitations upon the lawyers who, for private clients, have to deal with government. And when government uses the money of all taxpayers to compete with some taxpayers in fields hitherto left to private enterprise, the average lawyer suffers the withering and destructive effects, along with his clients and his community. In other lands, arbitrary and unchecked power has destroyed the independence of the legal profession as, perhaps, the chief obstacle to its schemes. The same trends should be discerned and resisted wherever they manifest themselves in the United States.

#### THE LEGAL PROFESSION IN THE LARGER CITIES

But what about the lawyers and their profession in the larger cities? What shall be the outlet for the ideals, the energies, the talents for public service possessed by lawyers who do not have the characteristic American opportunities for individual relationship to their communities? How shall we give these lawyers, the younger lawyers, from the time of their admission to the bar, an opportunity to associate and work with other lawyers, to gain some sense of membership in a great profession, and to do something for distressed mankind in the respects which come within the province of the law and the administration of justice? Ob-

viously the answer must chiefly be group action, not individual, because in the largest cities only the voice of groups is heard in behalf of constructive measures.

For my own part, I conclude that the answer must be found along the lines of the better organization, the much larger membership, and the more effective action of the organized bar—the bar associations, local, state, and national. The future of the legal profession in the largest cities depends, in my judgment, on the leadership of the bar association in enlisting the support of the lawyers generally, particularly the younger men of the bar, and in giving to the public the bases for genuine confidence in the integrity and independence of the legal profession.

Changes in the status of the legal profession as a whole, the organized legal profession, are taking place or are at hand in a large part of the country and perhaps in all of it. We could hardly expect the forms and routines, the unrelated and casual minority associations, to remain as they traditionally have been; the surface and substance of things have too much changed. Conceivably, there is already presented to the lawyers of the United States a choice of roads, a decision regarding the paths along which the future of our profession shall proceed.

By some, the demand is made that the lawyers should be organized and operated as "a public profession" under the control of government. By others, it is maintained that the lawyers should voluntarily organize, discipline, and govern themselves as an independent and self-governing profession.

#### CONTROLLING PRINCIPLES OF BAR ORGANIZATION

There are several principles which, it seems to me, should be controlling and decisive in whatever is done by way of the better organization of lawyers.



*In the first place*, lawyers and the legal profession exist as a means of public service; the distinction that separates a profession from a means of livelihood is that a profession is accountable to standards of the public interest, beyond the compensation paid by clients.

*In the second place*, the organization of lawyers into responsible professional groups is particularly charged with a sense of fealty to public rather than private or purely professional interests; and the form and extent of bar organization should be considerably determined by its suitability and readiness to promote the public welfare in respects pertaining to the law and the administration of justice.

*In the third place*, there are many matters on which the public is entitled to the advice and judgment and public-spirited leadership of the lawyers—not of a few lawyers, not of a selected minority of lawyers, but of a substantial majority or of the whole bar; and it follows that the organization and leadership of the bar should be such as to give the public the benefit of the disinterested counsel and advice of the rank and file of the profession rather than of any minority, however wise and patriotic that minority may be.

*In the fourth place*, in view of that need for public-spirited majority leadership, in view of the fact that lawyers are officers of the courts and a part of the administration of justice, and in view of the obligations owed by each lawyer under his oath, it seems clear to me that the organized bar should be self-governing and independent, should be fully representative of the profession, should be kept free of any manner of political control or intimidation, and should at all times seek to serve the public interest in matters within its province. Better no bar organizations at all than those that are intimidated or controlled by politics, sub-

servient to clients, or lacking in the courage to fulfill their independent public functions.

BUILDING TRULY REPRESENTATIVE  
AND INCLUSIVE BAR ORGANIZATIONS

It seems to me that these four standards or criteria should be pretty much the tests of what it is desirable to do by way of bar organization in the respective states. After all, the state is the unit of the legal profession and the organization of it; the national organization of the bar should federate the state organizations and reflect their views; and the national federation of the organized bar of the states can hardly be more representative or effective than are the state organizations which should comprise and control it.

The strength or weakness of the national organization of the bar depends upon the quality of the personnel and leadership of the bar associations of the states and localities. The lawyers of a state are officers of its state courts. Through its highest court of law, each state controls the admission and professional conduct and has the inherent power to authorize the organization and discipline of its lawyers. As the state is the unit of the legal profession, the state is the unit of power and of the decision of policy in the bar of the nation. We cannot expect that a national federation of the bar will be much stronger or more courageous than are the state and local bar associations back of it.

"VOLUNTARY" AND "INCLUSIVE" TYPES  
OF BAR ORGANIZATION

The earnest efforts now being put forth, in many of the states, in behalf of a more truly representative organization of lawyers proceed along two main lines:

*The voluntary type* of state bar association, to which such lawyers belong as wish to do so and are accepted as members; and

*The integrated or inclusive type* of state bar organization, to which all of the members of the bar of the state belong as a condition of practising law.

The goal of each is the establishment of a state bar organization which includes all, or at least a majority, of the lawyers and is democratically governed and competently led.

In the states that are adhering to the "voluntary" type of bar association, the efforts for improvement are along lines of great activity and usefulness in behalf of the average lawyer, of increases in membership through voluntary applications, and of development of some form of federation of the city, county, and district bar associations into the state association, under a delegate plan or other representative basis.

Seventeen states, with thirty-eight thousand lawyers, now have the integrated or inclusive type of bar organization. Every lawyer in these states is automatically a member of the state bar organization and has both the opportunity and the duty of participating in its affairs, of voting for the members of the board of governors of the state bar, and of living up to the public obligations of the legal profession.

Broadly speaking, the integration of the bar of a state comes about in one or two of three ways:

1. An act of the state legislature, creating or authorizing the creation of a state bar organization to which all lawyers belong as a condition of practising law
2. An act of the state legislature relinquishing to the highest court of law of the state whatever powers and control the legislature has over the conduct and the organization of lawyers
3. Rules and regulations promulgated by the highest court of law of a state in the exercise of its inherent judicial powers over the legal pro-

fession, authorizing or outlining the form of state bar organization for the lawyers of the state

AMERICAN BAR ASSOCIATION WILL REMAIN  
VOLUNTARY IN TYPE AND SELECTIVE IN MEMBERSHIP

I shall not argue here the merits or defects of either type of state bar organization. So far as the American Bar Association is concerned, it will and should remain voluntary in type and selective in membership, and should seek the federation of the state bar organizations rather than a nationally inclusive membership. Congress has no power to incorporate or integrate a national bar, and I am glad that this is so. The independence of the legal profession is fortified by its separate accountability to the courts of forty-eight states. The improved structure of organization of the American Bar Association is in no respect a plan for a national integration of the bar.

The American Bar Association has not recommended to the states the adoption of any particular type of bar organization. We study them all and furnish available data about them; but each state should, of course, adopt or continue whatever type of bar organization is deemed to be best suited to its needs and conditions.

So far as the American Bar Association is concerned, its new structure of organization, adopted by an overwhelming vote at the largest annual meeting in its fifty-nine years of history, permits and provides for the federation of "voluntary" state bar associations and "integrated" state bars on equal terms. Either type of state organization can participate equally well in the new House of Delegates of the legal profession, which already has begun to function as a great forward step in the better organization of American lawyers.

DO "VOLUNTARY" ASSOCIATIONS BECOME  
MAJORITY ORGANIZATIONS?

There are about 38,000 lawyers in the seventeen states that have integrated bars. As there are about 80,000 members of state bar organizations, there are about 42,000 members of "voluntary" state bar associations.

There are about 175,000 members of the bar who are practising law in the United States. Deducting the 38,000 lawyers in the states with inclusive bars, there are about 137,000 lawyers in the states with "voluntary" bar associations. But those bar associations have only 42,000 members—about thirty per cent of the profession.

In a few states the ratio of state bar association members to the total number of lawyers is much higher. As a general rule, the percentage is increasing.

There are about 110,000 lawyers who belong to some bar association—about 72,000 of these outside the integrated bar states. In the states with "voluntary" bar associations, about 72,000 out of the 137,000 lawyers belong to some bar association—a little more than half.

I do not believe that the "voluntary" type of bar association has anywhere near approached its actual possibilities of maximum membership, if this type of association sets out to make itself indispensably useful to the average practising lawyer.

## THE "INCLUSIVE" TYPE OF STATE BAR ORGANIZATION

Firsthand observation of the integrated bar leads to the conclusion that it generally is working well in the states that adopted it upon full consideration. Its results are not approved by some members of the bar in those states; but their opposition often commends the organization to public approbation.

In some states that have not adopted the integrated bar, the chief concern is lest that type of bar organization might prove to be a means of political domination and control of the legal profession, thereby destroying the independence of the American lawyer.

If this should prove to be the case, the integrated bar should be opposed by lawyers everywhere. At all hazards the organized legal profession must be kept independent, self-governing, and beyond political intimidation and control. The legal profession cannot afford to become the ward of the legislative or executive branches of government.

#### THE PLAN OF THE AMERICAN BAR ASSOCIATION

During the past year, in the American Bar Association, we formulated and adopted far-reaching changes in the structure of its organization, which have placed the Association completely and democratically under the control and leadership of the bar associations of the forty-eight states and of the members of the Association at home in the states. This is as it should be. The new House of Delegates of the legal profession now federates, on a truly representative basis, a numerical majority of American lawyers. The actual and practical results rest with the profession; the means of bringing about better things has been provided.

A great national organization of twenty-nine thousand lawyers could not leave its policies and its leadership permanently to the decision of some three thousand members who come to annual conventions. The annual meeting of the Association, held in Boston last August, approved and adopted these forward-looking changes as the practical means of bringing about a truly representative national organization of the bar, in the interests of the public as well as of the profession. The new House of Delegates will need to "get down to brass tacks" quickly, in independent

and outspoken discussion, and in realistic and courageous action, on the *real* problems confronting the profession and the public.

The United States needs today the representative and effective organization of its lawyers, which will speak and act in behalf of the rank and file of all its lawyers rather than for the views and wishes of any minority or section of the country. Gone are the days of "remote control" of bar associations; the rank and file of active practising lawyers are moving in and taking charge, as they should. If they do not, it is their own fault.

#### GOVERNMENTAL CONTROL OF THE PROFESSION MAY UNDERMINE ITS INDEPENDENCE

We of the bar have not been concerned with organization for its own sake, and did not seek an improved structure for its own sake. There are many matters on which effective leadership on a nationwide scale is required from American lawyers, unless the public welfare and the independence and prestige of the profession are to suffer.

Let no one think that the idea of a governmental, political control of the legal profession may not come actively into the picture. In the November issue of *Harper's Magazine*, the distinguished professor of political science at the University of London, Mr. Harold J. Laski, who has taught at great American and Canadian universities, discussed "the decline of the professions"—medicine and law. For the decadent conditions which he finds in the legal profession, the brilliant professor offers a ready and complete solution. Possibly some of its features may not be lacking in appeal to lawyers hard-pressed by lack of business and by shrinkage of incomes.

Under Professor Laski's suggestion for the organization of the law "as a public profession," the profession would become "a great corporation under government control, the members of

which should work for the public on a fixed salary at fixed charges." Based on the experience of Soviet Russia, he suggests that this "immense reform" is "a practicable one." "The private lawyer" would be "replaced by a body of public servants." The lawyers would "have no financial interest in either the content or the number of their cases." Under control by government, each lawyer would be assigned to such clients and such cases and maintain such contentions as the government conceived to be in the public interest. The ablest lawyers might, in the whirl of the lottery wheel of assignment, draw numbers dictating that they give their time and talent to the traffic courts, and the humblest members of your junior bar might be allotted to the defense of great principles of human rights and individual liberties, if indeed the government permitted such principles to be maintained and defended at all. In any event, all lawyers would stand equal before the law and before clients; selection of lawyers by clients would disappear; the maintenance or defense of clients' rights or interests would disappear, because clients would have no rights or interests; and, in return for their submergence and the disappearance of the traditional profession, all lawyers would receive equal compensation from the public treasury. Naturally, under such a regime, the government would necessarily control membership, on some quota basis, so that it would determine who should be admitted to the profession and who should be excluded therefrom, and who should be dropped from the profession, at any age or stage of life after admission to the bar.

The very recital of Professor Laski's proposal excites laughter and seems absurd. Such a suggestion would have seemed just as absurd in Russia twenty years ago as it does to us in this country today. What has taken place in the legal profession in Italy and Germany and Spain would have seemed absurd if suggested in those countries fifteen years or less ago. Can we be sure that we are



long exempt from this issue? Demand for the "socialization" of the medical profession has already been heard in the United States. Marching columns of men and women sing in our streets the song of revolution, "Arise, ye prisoners of starvation"; professors and teachers refuse allegiance to our Constitution and form of government; only the red flag of the International is displayed at great public assemblies in some of our cities. It seems clear to me that in reality Professor Laski's suggestion is in full harmony and accord with social philosophies which we hear advocated from high places—some colleges and schools, some churches and government offices—in the United States today, and is consistent with some challenges that already have been made about the rights and duties of lawyers and with some steps that have already been taken along the road that leads to the submergence of individual rights and human liberties.

AMERICAN LAWYERS BETTER WORK OUT THEIR OWN  
PROBLEMS IN THE AMERICAN WAY

What is the alternative to that road for the legal profession in America? Is it merely to let matters drift and muddle along as they are? Will such a course bring us past the signposts that lead to Professor Laski's highway?

If the lawyers of the United States do not want government to organize and control the legal profession, they had better organize, govern, and discipline it themselves, in the public interest. An independent and self-governing legal profession, which cannot be commanded by retainers, cajoled by public office, or intimidated and silenced by threats and charges against lawyers individually or against the profession as a whole, is one of the best safeguards of freedom in the United States. Those who seek to overthrow liberty under law and to substitute a socialized state realize full well that one of their first steps must be to dis-

credit and bring into disrepute the legal profession, because its members are intense individualists and the instinctive foes of mass tyranny in every form.

Attacks upon the integrity and independence of the legal profession are already heard from those who are unwilling that the policies and acts of government shall be kept within constitutional limits. In countries that have destroyed individual liberty, the advocates of a socialized state have sought a centralized and political control of the legal profession, even as they have sought a centralized and bureaucratic government, because it can more easily be seized by a daring minority and made the means of dominating an unresisting majority.

A vital element of strength and permanence of the legal profession, as at present constituted in America, is that it is separately organized in forty-eight states and is under the jurisdiction of the state courts of forty-eight states, and cannot be subjected to a centralized national control, by government or by any one else. I do not go along with the idea that there should be one big bar association for the whole United States, with state and local branches and one set of dues for membership in all. I much prefer to see strong and active local associations developed, with federation of the local associations in the state bar organizations, whether voluntary or integrated in type, and with the state bar organizations, and also the larger local associations, federated, as has been done, in a National House of Delegates of the legal profession, under the auspices of the American Bar Association. We should keep our local and state bar organizations as the primary and self-governing units of the legal profession; should resist all efforts to make the integrated bar or any type of bar organization an adjunct of partisan activity or a means of political control of lawyers; should oppose every step toward regimentation of the lawyers of America; and should preserve at all hazards the inde-

pendence and integrity of the profession of the law. This is no time to "close-herd" the lawyers of America.

It is time to be thinking about these things. It behooves us all to take stock of the situation and to see what needs to be done and can be done, to put our own house in order as to its undesirable members, and to serve better our profession and the public. We may well find out at which end of the profession the lawyers have been marching, and in which direction. We should not leave it to the occasional rebel or publicity seeker in the ranks of the bar to grab the flag and win individual acclaim by demanding action in the public interest. The bar associations should be made fully representative of the profession, should be kept free of political control and intimidation, should be kept self-governing and self-disciplinary by the rank and file of the profession, and should ascertain and speak and, above all, *act* in behalf of the best judgment of the profession as a whole. Even though mistakes be made, "intelligent action is preferable to inaction."

Lawyers are not trying to create any monopoly of special interest or privilege for themselves. Their cause and their concern is that of other citizens. This is a good time for unity and coöperation and public-spirited endeavor within the whole legal profession. The public needs the common sense and disinterested effort of all its lawyers, along with all its other good citizens, to defend and keep the sound fundamentals of the American form of government and the spirit of our institutions and laws.

The independence and prosperity and integrity of the legal profession are, I believe, of considerable public importance. There is the greatest need for unity and coöperation, on the part of lawyers, through an improved and truly representative organization of the bar. The men who believe in liberty and justice under law should stand together and work together, and not remain divided in different camps or minority groups. This is no time for super-

ficial or artificial divisions. No one suggests that the American people should follow implicitly or blindly the leadership of their lawyers; but in the discussion of changes in the American form of government and in the purposes of American institutions and laws, the lawyers should do their part in the informed discussion of the great issues before the people.

## THE AMERICAN BAR ASSOCIATION IN RETROSPECT

JAMES GRAFTON ROGERS

THE American Bar Association is the only national society of lawyers with a wide professional scope existing in the United States. It now enrolls about twenty-eight thousand members, all of whom, except a few honorary and life members, pay annual dues of eight dollars. Membership is open, in practice, to all members in good standing of the bar of any American state or territorial possession. The members receive as incidents to their membership the annual bound volume of *Proceedings* and the *Journal* of the Association published monthly. While the society enrolls as members only about a sixth of the licensed practitioners in the United States, it is representative of the bar as a whole.

A meeting or convention is held annually, usually in the summer or fall, at which about two thousand lawyers, chiefly members, register attendance. The meeting place is shifted each year and meetings are held successively in every quarter of the country. The program consists of nearly a week of general and group assemblies, addresses, dinners, and entertainment programs, and attracts many collateral meetings. The Association receives in various ways and expends about a quarter of a million dollars a year and has accumulated money and property approaching the same amount.

The Association is, in practice, at present governed by an Executive Committee of fifteen, nine of whom are elected for three-year terms, the others being ex-officio members chiefly by virtue of election to other executive posts. The president, who serves for

one year only, has in practice the chief responsibility. A sweeping reorganization is now in advanced stages of development.

Among the other national legal societies the American Law Institute, which is devoted primarily to the publication of treatises on law, the American Judicature Society, which is designed chiefly to support a journal of law reform and juristic progress, and the Association of American Law Schools, made up of a small and selected membership of high-grade schools, are the only organizations that approach its purposes or activities, and none of these is so wide in scope, general in membership, or popular in character. Several other national legal societies, such as the Commercial Law League of America and the American Society of International Law, are devoted to special fields of law.<sup>1</sup>

#### GENERAL PERSPECTIVES

On the bookshelves of thousands of American lawyers there will be found a series of somber brown volumes labeled *Reports* of the American Bar Association. There are now sixty volumes. In each is one illustration and one only, the frontispiece portrait of the president. The closely printed pages carry somewhere, as member, committeeman, officer, or speaker, the name of nearly every personality prominent in law or government in the United States in the last half century, and display as visitors the names of the chief legal figures of Great Britain and Canada and many great names from Continental Europe and Latin America. The brown volumes are seldom opened. They are ceremonial records. Their dense pages, it is true, contain here and there a speech or report that made history. Most of them are devoted to professional topics of days long past. The shelves as a whole comprise a diary of the political and legal thinking of the American people since the Civil War, diluted as the history is with words and obscured in the gowns of formalism. The books give little clue to the ample

and significant life of a great national voluntary society of American lawyers, or to the life, outlook, and traditions of the individual lawyer. The part of the lawyer in public affairs in America has surpassed in importance that which seems to have been assigned to the legal profession of any other nation in history. The reports prove this but they are heavy reading. The drama is suppressed, the color deliberately bleached.

In its real but largely unrecorded history, the American Bar Association has year by year exhibited the lawyer in this country in all the phases of his ideas, ideals, and activities. The social interchange, the reunions of old cronies, the political gossip and debate which have filled the convention lobbies for so many years, the bold personalities from the South, of the frontier, and of New England whose picturesque outlook and sometimes costume were familiar to everybody, the anecdotes which here attained national circulation—in short, the warm and democratic human atmosphere which in the beginning was, and today is, the lure of the annual sessions is nowhere written down. The printing press has never served as an adequate means of communication of sentiment and opinion in this vast country with its distant and individual regional cultures and traditions. New England and the Pacific Coast, the deep South and the Scandinavian Northwest, the metropolitan areas along Atlantic salt waters, and the wheat farms of the prairies have always depended upon word of mouth for common understanding. In almost every profession or business, some sort of annual convention has been the chief vehicle for news of what was thought and said in the far corners, of the trend of politics, of new craft methods, of searching out, mingling, and conglomerating national sentiment. The American Bar Association has been one of the most important of these market places for discussion, as the lawyers in this country are community leaders and spokesmen in high degree.

In its political phases alone the Association affairs show all the traits of the American jurist. The lawyer in this country is an indefatigable politician. The Association has expressed this tradition continuously. Its annual election of officers has been accomplished in a political cockpit. In recent years, since the influence of the elder inside group, which was concerned with dignity, prestige, and policy, has waned, the elections have shown all the faults and values of democratic processes. Considerations of geography, rewards for loyal service, even slate making and trading have had their day. The distinguished national leader has by no means had an easy road to the presidency. In other activities, also, the political preoccupations of the lawyer appear. The Association is perpetually interested in constitutional law and current party issues. It seldom, it is true, expresses itself on the latter. Formal discussions of partisan issues are minimized. But it never wearies of celebrating, examining, and pleading for the preservation of constitutional limitations on legislative, executive, and judicial powers. The faith in those principles, which today abides as one of the striking phenomena of public opinion in this country, owes no little to the lawyer and particularly to the recurrent campaigns conducted by the Association.

In many other directions, the Association reflects and has always reflected the outlook of the typical lawyer. Compared to legal societies in other nations, British, Continental, or Latin American, our national society has been little enticed by the grace and grandeur of legal pageantry. The drama of justice in older countries, with its panoply of mantles, wigs, caps, silver plate, and other symbolism, has little caught the American fancy. Until recent years the national headquarters of the bar might have been mistaken for a factory office. Today the national headquarters, in an old residence on a remote corner in Chicago, are as unpretentious as were the offices of the master plumbers who previously



occupied the same building.<sup>2</sup> The banquets and sessions are dignified, even ponderous, but quite unembroidered. The Association owns some art treasures given it by foreign lawyers but it hardly knows what to do with them.

Literature, which has been a blood brother of the law in England and on the Continent, is no intimate of it in America. The typical European society of jurists launches at once into the collection of a library, treasures old books, gathers portraits, and appoints committees to provide these symbols of dignity and tradition. The American lawyer until recent years had had little literary or historical training. Even today the river of his interests is widening into the plains of economics rather than into history, philosophy, or the arts. Few young lawyers in America earn bread and butter in the starving period by literature or journalism, though many do so abroad. The American Bar Association has no real library nor any hunger for one. Such interests as these seem, to the great mass of practitioners in the United States, the foibles of the gentleman and not the natural bypaths of the law.

The bar in early years never troubled itself much about professional training. It had been, since the era of Jefferson, easygoing and democratic about such matters. In the last fifteen years the Association has devoted much money and energy to raising standards of education and admission. Great consequences are ensuing. The truth is that during the present generation for the first time a bar grown better educated almost in spite of itself has become interested in improving the minimum requirements. The fields of professional ethics and discipline reveal the same evolution. The activity is now considerable. It became notable only within this century. In the same way, a mild interest in the law of other countries has developed. Meetings have been held in Britain and Canada, foreign speakers have become a routine, discussions of international and comparative law have gained a footing. These

developments represent a shift in the gaze of the typical American lawyer. He is looking to the more abstract phases of his profession and beyond the borders of this country which once confined his attention.

In organization the national Association has been as loose and voluntary in character as was the tradition for law societies in the several states. Until recent years professional societies in the state bars were the playground of the companionable and the well-to-do minority rather than any expression of the profession as such. The new conceptions of state organization of the bar, which began in the West in the last decade and which are now resulting in compulsory and all-inclusive state societies of lawyers on a rapidly developing scale, are having effects on the national society also.

In some particulars the Association reflects the traditions of the lawyer of every country rather than peculiar American outlooks. It has always been formally pledged to and even mildly interested in the improvement of our system of law, but collaterally rather than centrally. The Commissioners on Uniform State Laws represent in part a backfire set against threats of constitutional amendment but arise in part also from an impulse to law reform. Now and then a movement like that for the establishment of the United States Courts of Appeal which succeeded in 1891, and that for the modernization of federal court procedure, now in process of accomplishment, has commanded energy from the Association, but the society is not conspicuous as an infection center for law reform. The great battles fought locally in its early days over the procedural reforms involved in the Field codes and the stir at later periods over novelties such as juvenile courts and prison reforms have echoed in its halls but did not greatly enlist the Association. It has taken little or no part one way or the other in the popular excitement engendered over such cases as the *Sacco-Vanzetti* or *Mooney* or *Scottsboro* affairs. Its lobbies, like most of

its speakers, breathe conservatism.<sup>3</sup> These qualities inhere in lawyers everywhere from the very nature of their daily work. Legal conservatism is not American alone.

On the whole, the sixty-year course of the American Bar Association affords us a faithful portrait gallery of our national professional life and interests. Here may be read the companionableness, the democracy, the political preoccupations, and the keen interest of the American barrister in the principles of constitutional government. In a negative phase, there is to be noted his homespun simplicity, his lack of enthusiasm for literature, philosophy, and crusading reform, his domesticity and his comparative unconcern until recent years with academic training, guild discipline, or any close-knit form of organization. In the earlier days, the Association, like the lawyers who made it up, delighted in formal oratory. In recent years that delight has somewhat faded. There is current a fresh and strong interest in professional education, in stricter procedure for admission to the practice, in sterner ethical standards, in stronger guild organization, and to some degree in the historical, literary, and even theoretical backgrounds of lawyers' work. The Association has become, of course, the first in number of members and in income among the legal societies of the world, but that rank is a common case among national societies of this large nation.

#### BEGINNINGS AND PERSONALITIES

The American Bar Association was the creation of Simeon E. Baldwin of Connecticut. He planted the seed, nurtured the shoot, and tended the plant for many years. The soil of 1878 was fertile for his husbandry. The sentiment for reconstruction, for healing the scars of the Civil War and uniting the nation, as well as a growing feeling for bar organization, are evident in the legal journals of the day.<sup>4</sup> The progress of reconstruction needs no

elaboration here. The slow growth of professional societies in this country is not so familiar.

In the Colonial period there were many local lawyers' clubs and library societies and one New York Bar Association, which seems to have persisted for some twenty years, from 1747 to 1770.<sup>5</sup> Few of these societies survived the Revolutionary War. They were modeled chiefly on remembrances of the English Inns of Court in which many early American lawyers had been trained. The surge of democratic and agrarian sentiment associated with Jefferson and even Jackson seems to have suppressed any tendency toward revival of law societies after the Revolution, although short-lived associations sprouted in four Southern states and even in Massachusetts between 1825 and 1850. The Civil War snuffed out what faint sparks existed. At its close we find surviving only a handful of legal societies in the whole United States, all of them law-library groups in Boston, Philadelphia, and New York City. After the War, the foundation in 1870 of the Association of the Bar of the City of New York, as a result of the battle of the lawyers against the Tweed Ring, opened a period of organization which has proceeded with acceleration to the present day. Between 1870 and 1878 the organization of eight state and seven city societies is recorded. Most of these still survive. Between 1880 and 1890 some eleven state societies came into being, while twenty-one began in the Nineties and fourteen of the present state associations date after the opening of this century.

Simeon Baldwin said at the opening of the conference that launched the American Bar Association at Saratoga Springs on August 21, 1878, as reported by current newspapers,<sup>6</sup> that the plan for it sprang from a resolution passed by the Department of Jurisprudence of the Social Science Association which met at Saratoga Springs in September 1877. A search has not revealed any account or official record of this resolution.<sup>7</sup> The Science Association

seems to have been a rather informal annual conference which was held in a sort of Chautauqua style at the resort and attracted many summering professors and public men.<sup>8</sup> The newspapers show that Judge Baldwin was present along with David Dudley Field and Dean Carleton Hunt (both later active in the American Bar) at the Science sessions of 1877 and that he read a paper on legal education.<sup>9</sup> In Judge Baldwin's journals when released many years hence or in other less obvious sources something may be found of this little historical event. For the time being, we may conjecture that any resolution passed in 1877 was itself of Baldwin genesis, for subsequent events show that he alone fanned the spark. There had been much talk of bar-association organization and some suggestions even of a national organization, but the connection of these suggestions with Judge Baldwin's initiative is not apparent.<sup>10</sup>

At the meeting of the Connecticut State Bar Association in January 1878 at New Haven, the Judge's home, he proposed and had passed a resolution for the appointment of a committee of three "to consider the propriety of organizing an Association of American Lawyers."<sup>11</sup> Governor Richard D. Hubbard, William Hamersley, and Baldwin were named. Baldwin alone seems to have been active;<sup>12</sup> the other two men joined the Association when organized but neither was present at the Saratoga session or afterwards prominent in the Association. Hubbard's name was later signed to the invitation of July 1. At a session of the Connecticut Association on June 21, 1878, the committee reported progress. Under date of July 1, 1878, Baldwin mailed out a printed invitation for a meeting at Saratoga signed by fourteen lawyers, several of national reputation, from twelve states, in which he mentions himself only as a sort of corresponding secretary. This letter proposes "an informal meeting at Saratoga,

N. Y., . . . to consider the feasibility and expediency of establishing an American Bar Association." The invitation went to 607 men, about a third living in the three near-by states of New York, Massachusetts, and Connecticut. Seventy-five men signed the roll at the opening of the conference at Saratoga on August 21, 1878, and twenty-five more were admitted to the rolls the second day, apparently persons who had not been on the original invited list. Only four signers of the invitation appeared—namely, Bristow of Kentucky, Hitchcock of Missouri, Phelps of Vermont, and Tucker of Virginia—but these four were then and later men of fame. For all that, it is evident how much the adventure was Baldwin's own.

The judge had drafted that summer, in his vacation camp, a constitution and by-laws. Another young man of his own age and member of a famous Philadelphia family of lawyers, Francis Rawle, had seen but not been honored with one of the invitations. Rawle wrote to Baldwin asking if he could attend: received consent, came, and was for a long period a chief executive of the Association.<sup>13</sup>

The records of the two days of oratory and debate in the courtroom in the Town Hall are readily accessible in print and need no rehearsal here.<sup>14</sup> The judge's draft of the organic law seems to have been followed, and the name he used for the society in his invitation was accepted. The terms of this constitution are interesting but will be referred to elsewhere. The first printed report, issued by Rawle, the treasurer, in Philadelphia before the year was over, shows two hundred and eighty-four members from twenty-seven states and territories, with the South strongly in evidence. Louisiana had the largest roll of any state. As the treasurer reported subsequently the collection of dues from two hundred and seven for the first year, this record of membership

seems faithful.<sup>15</sup> It was a good start. The Association had entered a half century of steady progress, slow in cumulating, but to be checked only by war and depression.

Of the early personalities, Judge Baldwin was as interesting as any. He was thirty-eight when he founded the Association. He was a practising lawyer in New Haven who had attended both Yale and Harvard, already written a lawbook and served on some state statutory commissions, and was a teacher in and later the chief pillar of the Yale Law School. In these years and later his phenomenal industry and interest in public causes made his slight, erect, but nearsighted person one of national celebrity. He wrote indefatigably on law, politics, history, and other social topics. He became an editor, judge of the Connecticut Supreme Court, governor after he had been retired from the court for old age, sometimes discussed for president of the United States, and meantime executive of all sorts of civic and learned societies. A bit austere in later years, his personality remained well known in bar counsels far into this century as a force of quaint appearance but really extraordinary vision and energy. The Bar Association is the largest of his contributions to our institutions but is only one of the children of his imagination.<sup>16</sup>

Rawle, who was made secretary of the conference at Saratoga (along with a local man who soon disappears from the stage) and then at its close became treasurer of the Association for its first twenty-four years and as such performed the duties usually assigned to the secretary, was a wholly different sort.<sup>17</sup> He was thirty-two years old. As Baldwin's ancestry was ancient in New England and Yale, Rawle's was old in Pennsylvania legal history. Francis Rawle edited some editions of *Bouvier's Dictionary* and wrote a life of Edward Livingston, but was never a practitioner of very wide fame. He had been a Harvard oarsman and was an ardent alumnus. His tall frame, kept in trim to the last with

systematic exercises, and his store of Bar Association reminiscences and traditions made him known to many habitués of the meetings until his recent death. Like Baldwin he served as president after some years. At the Saratoga conference, when the chairman needed a gavel, young Rawle was sent across the street to a little hardware store and there bought a carpenter's mallet for seventeen cents. The Association still uses the mallet as a gavel. Split and worn with long usage, it has been twice mended by the lawyers of Colorado, once with silver and later with additional gold bands. These bands bear the names of all the presidents from the beginning. This gavel, seldom noticed by the members, is one of the few memorabilia of the society.<sup>28</sup>

Prominent at the first meeting was a group of famed lawyers, including Poland of Vermont, Hunt of Louisiana, Latrobe of Baltimore, Bristow just moved to New York from Kentucky after a stormy career as Grant's secretary of the treasury, and Colonel Jim Broadhead of Missouri. These men, with the New England orator, Edward J. Phelps, Henry Hitchcock of Missouri, Semmes of Louisiana, General Lawton of Savannah, and one or two others, including the poet-lawyer, William Allen Butler of New York, really nursed the Association through its early years. The society was almost a club of intimates. These men gathered each year on the porch of one of the three large hotels that made Saratoga a summer center for politics and gossip, had a toddy or two, planned who should be officers and who should be placed next in succession by virtue of delivering the annual oration. Nearly all the group were bold and picturesque men. Poland, who served for years, chiefly with Baldwin and Butler, as a member of the Executive Committee, and thus by general consent helped steer officially the whole Association, was an especially striking figure.<sup>29</sup> He was a Vermont farm boy, with a meager education. By sheer force of personality, Poland had



played a large part in the United States House and Senate just after the war. The public knew him as the investigator of the Ku Klux Klan and of the *Crédit Mobilier*. He was the real author of the Revised Statutes of 1873 and 1878 which long remained the reference basis for federal legislation. Conservative, domineering, and independent he strode around the back of the assembly room at annual meetings of the Association for many years, wearing a blue dress coat with a velvet collar, a buff vest, and brass buttons.<sup>20</sup>

The first president was Broadhead, a leonine sort of fellow from Missouri, then known as prosecutor of the St. Louis whisky frauds. The preliminary chairman was John Hazlehurst Boneval Latrobe of Baltimore. Latrobe was a railroad lawyer, inventor, author, sculptor, and architect, the gentle and industrious representative of a family famous for versatility. The first secretary was Edward Otis Hinkley of Baltimore, who served for fifteen years and was succeeded by his son who held the office in turn for about as long a time, but the post was a minor one as the tradition developed and neither of the Hinkleys was a national figure.

The early years of the Bar Association saw it developed as a selected group of lawyers who met annually at Saratoga. The South was much in evidence, partly because Saratoga with its cool air and sporting atmosphere attracted many Southern legal gentlemen, partly because the more temperate and mellow older lawyers everywhere were eager to mend the wounds of the Rebellion. The century was over before the society became popular or general in its membership or spirit.

The membership, starting with the seventy-five who first signed their names at the Saratoga conference, grew to 289 in 1879, 752 in 1888, 1,496 in 1898, 3,585 in 1908, 10,995 in 1918, and 27,178 in 1935.<sup>21</sup> The growth was slow until about 1900 and in 1925 reached a sort of plateau of over 20,000, which may repre-

sent a rather natural level for a voluntary society of this sort. At the annual meetings, held steadily at Saratoga until 1889 and then alternately at Saratoga and some large city until 1904, the attendance remained below 500 until 1911. In recent years it has varied between 1,500 and 2,500,<sup>22</sup> but most of this enrollment comes each year from the neighborhood of the meeting.<sup>23</sup> The old group of selected lawyers has become an assembly so vast that the individual as such scarcely participates except as a listener.

The Association seems to have elected its first woman member in about 1918,<sup>24</sup> although the constitution has never contained a stricture against women. In 1912 a bitter battle was fought on the floor over the accidental election to membership of three northern Negroes by an Executive Committee uninformed of their race. The Negro lawyers were retained as members, but since that day a statement of race is required on the application card, and a veto power given any five councilmen, inserted at the request of Southern members in the constitution of 1878, has effectively prevented election of colored lawyers. Still, there have been some occasional awkward moments. The battle of 1912 threatened to split the Association. George W. Wickersham of New York, then Attorney General of the United States, insisted that no insult be visited upon one of his staff by the revocation of his election after its completion. The Southern element was much agitated and there is no doubt that Wickersham eliminated himself as an obvious choice for president by his firm attitude. The official proceedings reveal only the compromise exposed on the floor of the session. Jacob M. Dickinson, the latest Southerner to have been president, presented the compromise.<sup>25</sup>

#### ACTIVITIES AND PROGRAM

The chief formal activities of the Association were nearly all anticipated in Baldwin's draft of its constitution and by-laws, or

soon developed under his personal guidance. Among the objects stated, he listed last the aim to "encourage cordial intercourse" in the national bar.<sup>26</sup> In the invitation, on the other hand, he put first "comparison of views and friendly intercourse" as "a pleasant thing for those taking part in it" as well as being "of great service." This function became and remained for many years the real attraction offered to the society's membership at annual meetings. It still remains an important factor. In 1878 few lawyers in the United States contemplated any other great purpose for a gathering of lawyers. There was little or no impulse to regulate the profession, influence legislation, or affect the administration of justice. The Constitution needed constant discussion, but was a political rather than a legalistic theme. Bar associations were few, undeveloped, and unfamiliar.

Today the Association exhibits a host of sections and committees, many seriously engaged in compiling, discussing, and publishing material on many branches of law and procedure.<sup>27</sup> This is a growth of the twentieth century. The early vitality was found each year not in assemblies or committee rooms but in strolling groups, coteries around a table and cigars, trading anecdotes, and discussing the political issues and personalities of the day. Many public careers were affected by the exchanges at these annual sessions. More than one man has been carried far in national politics by his friends who forgathered at the Bar meetings. This sort of thing continues but has been steadily losing ground as the Association has become more involved in internal politics, more concerned in its serious hours with strictly professional aspects of the lawyer's life, and less congenial perhaps to the lawyer-politician on the grand scale. The national lawyers' club has become a typical American craft assembly, popular in tone, in the control of numbers of men of smaller dimensions, rather sober and serious, and much compartmented. The groups

like that of Poland, Baldwin, Butler, and Rawle, succeeded later by other cronies such as Jacob M. Dickinson, George Record Peck, and "Private" John Allen, have successors but none of quite the same color and intimacy. The Association is a public institution, as Baldwin no doubt hoped it might become in time.

The topics of legal training and the standards for admission to practise were not originally stated as main objects in the constitution, but an annual committee on this subject was provided among the seven committees first set up in the constitution.<sup>28</sup> The first resolution on a business subject passed by the Association ordered a report on this theme prepared for the meeting of 1879.<sup>29</sup> It was proposed by Carleton Hunt of New Orleans, then dean of the law department of the University of Louisiana (now Tulane), who was a lieutenant of Baldwin's, had been present at the Social Science meeting of 1877 which had played some part in the movement now maturing, and had headed at the 1878 Conference the Committee on Constitution and By-laws, carrying its program on the floor.<sup>30</sup> It seems likely his resolution was, like the other first moves, planned with Baldwin. Hunt was chairman of the Committee of Education and Admissions for eight years.<sup>31</sup> Progress toward higher and uniform standards was to be amazingly slow.<sup>32</sup>

In 1879 a series of standards for stricter education was reported by the committee but action was postponed. Next year the report was defeated, and a weak substitute adopted. In 1881 a resolution calling for a three-year course in law schools was passed. Nothing further worth mentioning occurred until 1892, when another resolution was passed recommending the central administration of bar admissions by the highest court in each state and proposing a requirement of two years of law study. In 1893, the first "section" of the Association (that is to say, a subordinate group entitled to elect officers and hold meetings of its own), was set up

with this topic as its field. Dean Henry Wade Rogers of the Yale Law School became its head. The section began a series of notable meetings with such speakers as Woodrow Wilson and Justice Brewer. In 1897 the Association adopted a recommendation for three years of law study after at least a high-school education. In 1905 the section alone voted a condemnation of the practice of admitting lawyers on school diplomas without examination. All in all, it is fair to say that the movement for stricter standards made little progress for the first forty years of the Association's life. The reasons are obvious. The general level of education at the bar was low. Office study was almost the universal training. Preliminary education was nowhere much considered. The American lawyer was the least trained on the average so far as formal education went and the least concerned with admission standards of all law practitioners in the world. A few men had been intensively prepared but the masses of lawyers were as casually prepared as they were numerous in comparison to those of other countries. The same conditions applied to the medical profession.

In 1921, under the leadership of Elihu Root, a series of standards calling for two years of college training as a preliminary and three years of law study in a school which meets several listed requirements were carried in the annual meeting and then publicized by a special conference of state and local bar delegates held in Washington the following year.<sup>33</sup> The standards were bitterly fought but both meetings were carefully prepared in advance and the program carried. Since that time, in spite of occasional guerilla warfare against the standards, chiefly led by commercial night schools, the Association has spent on this program the largest items given in its budget to any cause. Today two thirds of the lawyers of the country live in states that have adopted approximately the program of 1921, yet less than half

the American schools offering law courses have met the Association's approval and less than thirty states have adopted its standards officially as the basis of license requirements.<sup>34</sup> The battle, however, appears to be won. Progress has recently become quite rapid. The results represent not only the first reform measure undertaken by the Association, and the one to which it has given most consistent support, but its most extensive achievement.

The subject of professional ethics and discipline was included vaguely if at all in the invitation to Saratoga or in the first form of the constitution. The latter contains a reference to a committee on grievances to be established. The former speaks only generally of "reforms." Here again the attention devoted to the topic was slight for a generation. In 1908, at last, the Association adopted a Code of Ethics which soon became the standard officially or otherwise for nearly all the states.<sup>35</sup> In 1924 there was drafted, under the leadership of ex-President Taft, and adopted a Code of Judicial Ethics which is generally but not officially treated as the American statement of ideals for the bench.<sup>36</sup> In 1924 the grievance committee began the publication of a series of opinions on specific cases submitted as questions arising under the Codes. These have become standard reference material.<sup>37</sup> The Committee on Professional Ethics and Grievances, under the system of state control of the bar which prevails in America, has only a recommendatory or publicity power. Notwithstanding this, its rulings have become significant. In recent years special committees on new Canons and on Unauthorized Practice of the Law have supplemented the work.<sup>38</sup> The lawyers' interest in bar discipline has been much aroused in late years by widespread abuses in the metropolitan sections. The national Association as a consequence has shown increasing activity. Practically all the development has occurred since the World War.

The ambition to encourage uniformity in the varying decisions and legislation of the states, hinted at in Judge Baldwin's invitation, was given a chief place in the statement of objects made in the constitution, and became a chief activity of the Association.<sup>39</sup> In 1892 a meeting (following a committee appointed in 1889) was held at Saratoga under the wing of the Association, resulting in the organization of a National Conference of Commissioners on Uniform State Laws, which has met annually or oftener ever since and has drafted about sixty model statutes, chiefly on commercial topics.<sup>40</sup> These model laws have been approved from time to time by the Association and thus recommended for adoption by the states. The Conference has been financed chiefly by the Association and has been closely but indefinitely combined. Its Negotiable Instrument Law is in effect everywhere in the United States, while its proposals on the laws of sales, warehouse receipts, veterans' guardianship, bills of lading, and stock transfers have been accepted in most of the states. Its contribution in such matters is not widely known to the American public but has been important. Today its original opportunities seem largely exhausted, and it is seeking a new scope of usefulness.<sup>41</sup> The Conference was for many years the most important political group in the Association. While its membership was appointed by the state governments, the personnel became in practice self-selected from among the active Association membership, as the work was considerable and uncompensated. The state governors had no applicants for the post except from the Association. The Conference has met regularly during the week prior to the annual sessions of the Association and at the same place. During this week the internal politics of the Association have been arranged. Several presidents of the Association and scores of Executive Committeemen and other officers owe their election primarily to their participation in this Con-

ference. The Conference seems sometimes to have done some harm internally just as it has done great public service externally.

The six decades have seen the Association involved in a few public battles and in a small but respectable number of efforts at law improvement besides those already described. Of these transitory issues the great campaign against the judicial recall carried on from 1911 to 1919 and finally triumphant against such strong popular leadership as Theodore Roosevelt and the whole regiment of sympathizers who rallied to the Progressive party is most interesting and convincing.<sup>42</sup> Rome G. Brown of Minneapolis led a committee that drenched the country with attacks on the proposals to make both the tenure of judges and their decisions subject to recall by popular election. The recall proposals gained considerable headway. The Association undoubtedly was the main agency in their ultimate defeat, and sentiment for them seems unlikely soon to revive. The establishment of the system of United States Circuit Courts of Appeals in 1891 grew directly from the work of the committees of the Bar Association appointed to devise means of relieving the dockets of the Supreme Court.<sup>43</sup> The Pomerene Law on Interstate Bills of Lading<sup>44</sup> and part of the extension of the system of discretionary review called *certiorari*<sup>45</sup> as well as the increases of salary given federal judges owe much to the Association.<sup>46</sup> The society has at times carried on long campaigns, usually under the name of "citizenship," for the cultivation of faith in the American system of constitutional limitations. There can be no doubt of the influence of lawyers in this matter. The deeply ingrained reliance of the people on this system owes much to the American Bar Association.<sup>47</sup>

The Association has steadily thrown its weight in favor of American participation in the World Court.<sup>48</sup> Under its shadow also grew the project undertaken by the American Law Institute



of publishing an unofficial code or "restatement" of the principal fields of national jurisprudence.<sup>49</sup> This undertaking, however, was one conceived by a group of scholars and New York lawyers, led by Elihu Root and acquiesced in rather than warmly forwarded by the Association.<sup>50</sup> It never widely enlisted the rank and file. Finally, in recent years, the Federal Congress has passed an act for the formulation by rule of the Supreme Court of a new procedure on the law side of the federal courts which may also include equity practice, all as a consequence of many years urging by committees of the Association.<sup>51</sup> Curiously enough the act was passed after the Association had abandoned the effort.<sup>52</sup> That fact has no great significance, as it was largely accidental.

The Association publications have accumulated to vast quantities. Besides the annual *Report*, the chief publication is the *Journal*, begun as a quarterly in 1915, made a monthly in 1920, and now much the most widely circulated and read law periodical in the world. It is managed by an independent self-perpetuating board under a curious arrangement, devised to guarantee freedom from political and personal pressure.<sup>53</sup> The large annual reports of the National Conference of Commissioners on Uniform State Laws, the little issues called *The Bar Examiner* and *Notes on Legal Education*, issued from the office of the section on the latter subject, are established periodicals. There are many other current publications by various committees and also numerous annual printed reports, model acts, and other publications. The Association has published a few books, one a reprint of Sharswood's *Professional Ethics*, others in the form of illustrated accounts of the visits of American lawyers abroad in 1924, and two volumes published in connection with the Association's semicentennial. One of the latter is the text of a pageant produced at Seattle by the society.

The Association offered in its earlier years a medal for distin-

guished jural service. Again it was one of Judge Baldwin's plans. The project exploded at the first awarding in a controversy over whether David Dudley Field or Lord Selborne should get the award. It was given to both and discontinued.<sup>54</sup> In 1929 an annual medal was reestablished, to be awarded by a committee and not by popular vote as in the earlier case. Williston, Root, Holmes, Wigmore, and Wickersham received the award in successive years. None was given in 1935.<sup>55</sup> In 1934, under a bequest of Judge Erskine M. Ross, a large annual cash prize for an annual essay was first offered.<sup>56</sup>

On the side of contributions to the machinery of bar organization in the United States, the Association has been an important though conservative force. The American Law Institute, already mentioned, the Association of American Law Schools, and the National Association of Attorneys-General are all to a large degree offshoots of the national society. The Canadian Bar Association with its satellite, the Conference of Commissioners of Uniformity of Legislation in Canada, came into being directly as an adoption of the model in the United States.<sup>57</sup> The society has taken no positive stand on the development of the form of an all-inclusive, incorporated bar which is known as "integrated" and which has been so rapidly spreading in the United States in the last ten years, but it has steadily encouraged stronger state and local organizations.

#### CONCLUSION

As this is written the Association itself is deep in the throes of an internal reorganization that is intended to convert it ultimately from a voluntary self-governing society to a federated organization in which delegates from state and local law societies will control its policies and choose its officers.<sup>58</sup> The sentiment for this form of organization is old. Its realization has been at-

tempted more than once in the past. It seems to have been the form of organization originally in the mind of Judge Baldwin. It is likely now that the state organizations and the stronger city groups have reached sufficient dignity and power to support a federalized national body of delegates. There can be little doubt that this is to be the ultimate form of the American Bar Association.

## NOTES

<sup>1</sup> A rival association, launched in 1888, did not survive. *The National Bar Association* (1888) 22 AM. L. REV. 767; 8 MO. STATE B. A. REP. 128 (1888); 11 ALA. STATE B. A. REP. 77 (1888); 13 *id.* at 131 (1890); 15 *id.* at 197 (1892). Oddly enough Broadhead was a leader of this as well.

<sup>2</sup> (1930) 16 A. B. A. J. 282.

<sup>3</sup> The Association opposes the Child Labor Amendment, 58 A. B. A. REP. 319 (1933); but backed the Inauguration Date Amendment, 57 *id.* at 170 (1932), for example.

<sup>4</sup> Rogers, *Fifty Years of the American Bar Association* (1928) 14 A. B. A. J. 521-526; (1867) 1 AM. L. REV. 395; (1871) 4 *id.* at 614; (1872) 5 *id.* at 443; (1878) 18 ALBANY L. J. 76; Weart, *The American Bar Association* (1904) 27 N. J. L. J. 292.

<sup>5</sup> Wickser, *Bar Associations* (1930) 15 CORN. L. Q. 390, reprinted in 15 MASS. L. Q. 1, on this whole subject; WARREN, *HISTORY OF THE AMERICAN BAR* (1911); REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* (1921).

<sup>6</sup> N. Y. Tribune, Aug. 21, 1878, at 1, and N. Y. Times, Aug. 22, at 2. Cf. letter in (1878) 18 ALBANY L. J. 180. (1879) 13 AM. L. REV. 381; (1878) 18 ALBANY L. J. 158.

<sup>7</sup> N. Y. Herald, Sept. 6, 7, 1877. No official proceedings have been found.

<sup>8</sup> Wickser, *loc. cit. supra* note 5.

<sup>9</sup> Herald, *loc. cit. supra* note 7; (1877) 15 ALBANY L. J. 173.

<sup>10</sup> But see (1878) 16 ALBANY L. J. 268; (1878) 18 *id.* at 180.

<sup>11</sup> On the early history see J. G. ROGERS, *AMERICAN BAR LEADERS* (1932); J. G. Rogers, *loc. cit. supra* note 4; Kemp and Taylor, *American Bar Association* (1928) 3 WASH. L. REV. 65-78; Rawle, *How the Association Was Organized* (1928) 14 A. B. A. J. 375-377; Brackett, *Address of Welcome* (1917) 42 A. B. A. REP. 20; Kemp, *The American Bar Association* (1923) 7 MINN. L. REV. 520; Lambert, *A French Estimate of the American Bar Association* (1924) 10 A. B. A. J. 309; P. Rogers, *The Story of the Carpenter's Mallet*, 30 COLO. B. A. REP. 116 (1927); Davis and J. G. Rogers, *Colloquy*, 52 A. B. A. REP. 42 (1927); Rawle, *Remarks*, 26 A. B. A. REP. 25 (1903); 52 *id.* at 38 (1927); Rawle, *A History of the American Bar Association* (1926) JEALOUS MISTRESS, pamphlet of Colo. Bar Ass'n, at 19-20; Cutcheon, *Short History of the American Bar Association* (1899) 4 MICH. L. J. 73; Weart, *supra* note 4, at 292, 336; MADIÉ, *L'ASSOCIATION DU BARREAU AMÉRICAIN* (1922).

<sup>12</sup> Rawle, *supra* note 11, 14 A. B. A. J. at 375.

<sup>13</sup> *Ibid.*; Rogers, *supra* note 4, 14 *id.* at 521.

<sup>14</sup> 1 A. B. A. REP. (1878).

<sup>15</sup> 2 *id.* at 337 (1879).

<sup>16</sup> J. G. ROGERS, AMERICAN BAR LEADERS, 61.

<sup>17</sup> *Id.* at vi and 121. The Association has had only three treasurers in sixty years: Rawle, 1878-1902; Wadhams, 1902-1926; Voorhees, 1926-; 60 A. B. A. REP. 735 (1935).

<sup>18</sup> P. Rogers, *loc. cit. supra* note 11; Davis and Rogers, *loc. cit. supra* note 11; J. G. ROGERS, AMERICAN BAR LEADERS, vii.

<sup>19</sup> LUKE POTTER POLAND, 15 DICTIONARY OF AMERICAN BIOGRAPHY 32.

<sup>20</sup> Weart, *supra* note 4, at 295; manuscript in author's hands.

<sup>21</sup> A. B. A. REP. for years 1879, 1888, 1898, 1908, 1918, 1935.

<sup>22</sup> 60 *id.* at 711 (1935).

<sup>23</sup> Simmons, *Representative Government for the Bar* (1929) 13 J. AM. JUDIC. SOC. 74; Wickser, *loc. cit. supra* note 5.

<sup>24</sup> Mary F. Lathrop is the name of the first woman member.

<sup>25</sup> 37 A. B. A. REP. 11-16, 93 (1912); (1936) 95 N. Y. L. J. 754.

<sup>26</sup> 1 A. B. A. REP. 4 (1878).

<sup>27</sup> There are now ten "sections," thirteen standing committees, at least fourteen special committees of the Association, and seventy-five section committees, besides the officers. More than a thousand men hold official positions. 60 A. B. A. REP. 9-55 (1935).

<sup>28</sup> See generally Smith, *History of the Activity of the American Bar Association in Relation to Legal Education* (1930) 7 AM. L. SCHOOL REV. 1-7; REED, PRESENT DAY LAW SCHOOLS (1928) 21.

<sup>29</sup> 1 A. B. A. REP. 26 (1878).

<sup>30</sup> *Id.* at 16.

<sup>31</sup> Smith, *loc. cit. supra* note 28.

<sup>32</sup> Rogers, *Higher Bar Standards* (1935) 21 A. B. A. J. 713.

<sup>33</sup> 46 A. B. A. REP. 37-47, 661-688 (1921); 47 *id.* at 482-591 (1922).

<sup>34</sup> Rogers, *loc. cit. supra* note 32, and REPORTS each year.

<sup>35</sup> 60 A. B. A. REP. 683 (1935). Amendments were made 1928 and 1933.

<sup>36</sup> *Id.* at 697, 58 *id.* at 704 (1933).

<sup>37</sup> OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS (1924).

<sup>38</sup> E.g., 60 A. B. A. REP. 521, 548 (1935).

<sup>39</sup> 1 *id.* at 4, 16 (1878).

<sup>40</sup> 60 *id.* at 733 (1935); REPORTS (1892-1903) (report of Conference); PROCEEDINGS, *id.* 1904-1919; HANDBOOK, *id.* 1922-1934.

<sup>41</sup> 60 A. B. A. REP. 119 (1935).

<sup>42</sup> 36 *id.* at 8, 51 (1911) and reports for years to 1919.

<sup>43</sup> Act of March 31, 1891; Rawle, *loc. cit. supra* note 11, JEALOUS MISTRESS; 5 A. B. A. REP. 343 (1883); etc.

<sup>44</sup> Act of Aug. 29, 1916; 38 A. B. A. REP. 477 (1913); 39 *id.* at 447 (1914); 41 *id.* at 424 (1916); (1916) 2 A. B. A. J. 382.

<sup>45</sup> 40 A. B. A. REP. 622 (1915).

<sup>46</sup> Rawle, *loc. cit. supra* note 11, JEALOUS MISTRESS; 52 A. B. A. REP. 364 (1927).

<sup>47</sup> Cf. 60 *id.* at 430 (1935) and *passim* (1921-1935); J. G. ROGERS, AMERICAN BAR LEADERS, 223.

<sup>48</sup> 41 A. B. A. REP. 55 (1922); 59 *id.* at 196 (1934), and intervening.

<sup>49</sup> *Id.* 1932-1935, *passim*, "Statements concerning . . . Institute," 1923-1935.

<sup>50</sup> 1 AM. LAW INST. PROC. 2 (1923) *et seq.*

<sup>51</sup> Act of June 19, 1934; 44 A. B. A. REP. 35 (1919).

<sup>52</sup> 58 A. B. A. REP. 108 (1933).

<sup>53</sup> A. B. A. By-laws, article VII; Constitution, art. VI, 1; IX, 1, in 1935.

<sup>54</sup> 12 A. B. A. REP. 6, 96 (1889); 13 *id.* at 41, 339 (1890); 14 *id.* at 50, 361 (1891); 45 *id.* at 42, 422 (1892); 16 *id.* at 60, 347 (1893). Rogers, *supra* note 4, 14 A. B. A. J. at 521, 525.

<sup>55</sup> 60 A. B. A. REP. 710 (1935); 59 *id.* at 254 (1934); (1929) 15 A. B. A. J. 746.

<sup>56</sup> 59 A. B. A. REP. 190 (1934); 60 *id.* at 71-79 (1935).

<sup>57</sup> Lambert, *supra* note 11, at 310; REED, *op. cit.* *supra* note 28, at 336.

<sup>58</sup> 60 A. B. A. REP. 163, 556 (1935); Rogers, *The Demand for Reorganization in the American Bar* (1930) 16 A. B. A. J. 15; (1936) 22 *id.* at 83 (editorial statement).

## COÖPERATIVE EFFORT IN THE LAW

HERBERT F. GOODRICH

IT WILL probably be generally conceded that the man of the law is, individually considered, a rather attractive human being. His dealings with other humans tend to smooth the rough edges that sometimes prevent pleasant contacts among men; the nature of his calling in handling the affairs of others tends to develop all of the outgoing elements with which his personality is equipped. The lawyer usually has a sense of humor, which is perhaps another way of saying he has a sense of proportion. He belongs to a profession which has held its place for a sufficient number of centuries to give him the sense of security in his profession comparable to that in the social world which would belong to the twenty-fifth Earl of Badminton. He, therefore, is not self-conscious, nor is he overserious about his own importance, however jealous he may be for the idols of his tribe. And so he can run a committee meeting, head a community-fund campaign, or make the address of welcome to the visiting firemen in a way that brings equal satisfaction to himself and to the community at large.

The same good citizen who may regard the lawyer as a friend and a companionable human being may at the same time regard his friend's occupation as a trade full of tricks. He finds many things to justify this belief. While personal contact with the administration of criminal law is either totally lacking or is confined to the time when he was fined for driving his car too fast through some small but self-important village, he receives, through his daily paper or his radio, colorful and highly seasoned accounts of the trials in spectacular criminal cases. He finds in the

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conduct of the advocates who appear in those trials much that leads him to feel that their object is to conceal and distort facts, not to develop them, for often he is sure before the case is tried that the prisoner is guilty and should be in jail. The citizen may never have been involved in a lawsuit: most people have not. If he was, it seemed to him to require an unconscionable time and cost an unreasonable amount of money to get just a part of what he should have been given promptly and cheerfully by his opponent. Even without such experience he may feel that he hears, with too great frequency, reports of disciplinary action against members of the profession in instances that seem to him to involve a deplorable lack of common honesty on the part of the persons involved. Even without such harsh suspicions on moral grounds, the intelligent and not unfriendly citizen may feel, sometimes does feel, that the lawyer has at most a certain technical skill for doing things which his clients want done, and that in the application of that skill he is called upon for something less in imagination and ingenuity than the alert youngster in overalls who can so quickly locate the source of a knock in an internal-combustion engine.

That the performance of the lawyer's function does involve the application of a learned technique is undoubtedly true. He must know what court he should apply to for certain things; he must know the routine for getting his matter before such a court, the rules for conducting it when there, and the steps to collect his money if his contest is successful. He must know and apply certain rules which have become fixed with regard to certain transactions, such as the drawing of commercial contracts and the execution of deeds and wills, regardless of what he thinks of their wisdom. Much of his time must be spent in matters where the application of the rules is purely routine and where the only new

feature is the idiosyncrasies of the individuals affected in the immediate transaction.

The law is a practice no doubt. That it is not always recognized as something more than that is because the law functions in the hurly-burly of this world of human affairs. A court is not a laboratory established to discover ultimate truth, but a tribunal set up to settle disputes between people who cannot settle them for themselves. In the course of so doing, it does, in our Anglo-American scheme of legal precedent, do a great deal more. There is built up during the years a great body of legal doctrine, representing the collective judgment of hundreds of advocates and scores of judges upon the rules thus established for the guidance of human affairs. But our judge-made law, which, except for codification in some branches, is still the great bulk of legal authority in America and England, is law that has been hammered out in the heat of contest, piece by piece. This method of law building has its advantages. It tends to keep the law real, practical, close to the lives of the people it touches. But contrariwise, it also tends to create a patchwork of individual instances without a pattern to follow. But the best way or not, it has been our way.

This collection of individual instances, developing principles, trends of lawyers' thought which we may loosely call law, has sufficient of the odor of sweat and dust and human tears about it to provoke occasional sniffs from the illuminati. "Distance disinfects dividends," said Professor Ross of Wisconsin, thinking of the change in air from a Pittsburgh steel mill to a Fifth Avenue mansion and art gallery. Distance also performs other useful functions. The successive steps from pure science to applied science to invention to commercial production, with its accompanying high-pressure sales department and flamboyant advertising, create a wide enough gulf so that the laboratory man can disclaim



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spiritual kinship with the writer of advertising copy. The biochemist who discovers the existence and function of a vitamin may well disavow connection with the blatant proclaiming of its virtues as an ingredient in a patent cough syrup; the dermatologist may safely repudiate responsibility when statements concerning the function of the human skin come forth from the radio in the oily tones of one purporting to be Lady Esther. We in the law have no such insulation. Law thinking, lawmaking, law administering are not separated. Each of us must bear responsibility for all.

As our society matures, however, it is inevitable that we should not be content to have the growth of our law remain merely a matter of accretion of additional instances. While the majority of its followers necessarily devote themselves to the securing of legal rights for individual clients, others devote themselves to its intellectual side. Not the least interesting phase of the latter movement in America has been the rise of the modern law school in which the emphasis has been, so far as possible, on the scientific side of the law. That law school, itself an outgrowth of a desire to emphasize the law as something more than a practice, has in turn stimulated many movements for legal progress on both the practical and the intellectual sides.

The movement is one; its manifestations are many. One manifestation is the growth, both in numbers and in scope, of professional association among lawyers. Not many years ago, a bar association consisted of a voluntary association of gentlemen who met once a year, enjoyed each other's society at a good dinner, passed some resolutions, accumulated a small deficit, and adjourned. The foregoing description still marks the limit of activity for some groups. But, for many others, the bar organization has become an active working unit, functioning the year through. In no instance is the development more striking than in that of

our largest professional body, the American Bar Association, described elsewhere in this publication by Professor James Grafton Rogers.

Increased bar-association activity is but one of the many instances of legal renaissance in America, for many nonofficial groups are doing fine work in many different fields. One attacks the problem of legal procedure in an effort to reduce expense, lessen delay, and increase efficiency. Another joins with the historian in the study of the history of American legal institutions. Lawyers with a scientific turn of mind adopt this method of the laboratory and sometimes singly, sometimes collectively conduct field studies to try to find how legal rules which appear in lawbooks actually work when applied to the lives of the men and women whom they affect. Members of the profession from the bench, the schools, and the bar form themselves into a body called the American Law Institute and endeavor, through a re-statement of the common law in its chief subjects, to bring a clarity and certainty to principles now obscured by clouds of individual instances. All these things are good; the sum total of the contributions should be a substantial payment upon the debt of public service the lawyer owes as a member of his profession. Further, along the same line, some of us want to know whether certain legal rules work at all. Does the law stated in the lawbooks get into action in the affairs of men? If so, how great is the change from law in books to law in action? All these questions and others are in the minds of thoughtful followers of the law today. Much of what we may call the new curiosity comes, as might be expected, from the universities. Much of its inspiration has obviously come from stimulating contact with the exciting world of the natural scientists—also by the renaissance in the social sciences. But whenever it starts and whatever has stimulated it, the new curiosity is present and growing and makes our present-

day legal world the most interesting in the history of American law.

The remainder of this paper deals mainly with the work of the American Law Institute. In thus limiting the discussion, the writer does not imply that the Institute is the one and only enterprise entitled to a halo for good works performed. Each of the enterprises mentioned above has great usefulness, and a description and appraisal of the program and accomplishments of each merit a separate paper. But the editor of this centenary publication asked for one about the Institute, and editors should be obeyed. No attempt will be made to give in detail the history of this organization, its method of operation, or a chapter and verse account of each separate piece of work. All this has been done both by sympathetic and by adverse critics in many law journals during the past decade.<sup>1</sup> Instead, a brief summary of work to date will be given, with an outline of what may be hoped for in the development of plans for the future.

Since the American Law Institute was organized in 1923, it has been engaged chiefly on two main projects. One of them is the model Code of Criminal Procedure. The Code was finished and approved in 1930. It was universally acknowledged to be a highly competent technical piece of work. At the time of its completion the interest of lawyers and the public in criminal-law administration seemed to be at low ebb. No one except a few scholars in law schools seemed to be excited about improving criminal procedure or about any other work in the criminal law. We have moved a considerable distance since that time. It seems fair to say now that the interest is almost at flood tide. Whether changes come through American Bar Association activities, the federal government's participation through the Department of Justice, or from certain spectacular criminal careers by well-known and well-advertised public enemies is an interesting query, but not

important here. The model Code of Criminal Procedure has received and is receiving a great deal of attention due to this awakened interest in matters concerning criminal justice. It is constantly discussed by bar-association committees, state commissions, and other bodies, official and unofficial. Each legislative year sees portions of it enacted into law in the various states.<sup>3</sup>

The other main piece of business of the Institute thus far has been the *Restatement of the Law*. Nine volumes have appeared; two in *Contracts*, two in *Agency*, two in *Torts*, one in *Conflict of Laws*, and two in *Trusts*. It has been hard work, terribly hard work. Only those who have been very close to it know the thought and energy it has taken from the director, the reporters, their assistants, and from many members of the advisory committees. The product is high in quality and is so regarded by the profession. Lawyers cite it to courts, judges quote it in opinions, law professors write articles about it. The common law can be restated and the Institute is successfully restating it.

As is inevitable in human affairs, there are varying degrees of enthusiasm about the Institute's accomplishments to date. Many of us in the law, and especially those whose legal work is within the teaching profession, feel that there is a serious social lag between our legal rules and our rapidly shifting society. Being conscious of that lag and being socially minded persons we are eager to see it grow less. Each has his own favorite method of taking up the slack and his own selected spot where he thinks the most effort should be made. It is to be expected in the course of things, therefore, that, when considerable effort is expended in a method different from one's own or outside the particular field which one thinks most important, he will directly or inferentially chide those whose approach is not the same as his. Thus the criminologist may say that the Code of Criminal Procedure does not help to solve the riddle of the misfit individual in society and the

penologist may add that such a code offers no program for reshaping the misfit, if he is convicted of crime and sent to a penal institution, to take his place in the complex life of our day. A restatement of existing law, another suggests, does not grapple with the more fundamental problem whether the existing law is adequate to the needs of present-day society.

The truth of such statements will be readily admitted by any thoughtful lawyer and certainly by all members of the American Law Institute. Criminal procedure is only one part, and perhaps a small part, of an enormous social problem. But note also that it is the part of a larger problem which the lawyer is closely in touch with and for the successful operation of which he is responsible. He does not know, from his professional knowledge or experience, why men commit crimes. He has no answer, based upon his technical learning, to the question, What is the best thing to do with lawbreakers? He should not ignore those questions, but his first responsibility is surely in the field where he does have peculiar professional knowledge and skill. It is entirely appropriate, therefore, that the Institute's first venture into the almost limitless problems in the field of criminal justice should have been in criminal procedure.

In the same way, many of the problems of our substantive law go far beyond questions concerning that body of precedents built up in the course of development in England and America. These problems are based upon unsolved questions in economics, sociology, and government. Their solution, if, as, and when we find the solution, will call for many heads in addition to that of the lawyer. It is likely, too, that the method used for changing law to fit changing times will in some instances need to be more rapid and more drastic than the slow development through judicial precedent. Who knows, for instance, but that a compensation scheme in motor-vehicle accidents may one day come with the

swiftness that marked the change from employer's liability to workmen's compensation in the industrial field?

Be that as it may, the problem of immediate importance and of professional responsibility for the lawyer seems that of our common law. Is it clear? Is it consistent with itself? Do our legal terms mean what they say? Have we general principles or only myriads of separate instances? Here, too, the first problem in legal work seemed to be that of straightening out our own material, a reëxamination and restatement of existing common law. And that is where the Institute began.

It is the privilege of any one working in one part of our legal field to deprecate the endeavors of those in other parts of the field. The same privilege is open to the spectator who sits on the fence and watches both groups. But it is also the privilege and the duty of those who are on the job that seems to them worth doing to say, as did Nehemiah when Sanballat and Geshem invited him to a parley when he was building the walls of Jerusalem: "I am doing a great work, so that I cannot come down." The project of restating the law was not adopted in a hurry. It had thoughtful consideration from a group of distinguished persons from all branches of the legal profession who concluded it was worth a major effort in time and money. The success of the work thus far and the invaluable coöperation which it has received from the profession throughout the country since the work began prove the soundness of the original decision.

Along with the Restatement we have the state annotation program. The project of local annotations is not, strictly speaking, an Institute activity, although the Institute has encouraged and helped it. Obviously, an annotation program cannot keep pace in all states in all subjects with the Institute's rate of work in restatement. There are not enough well-organized bar associations in the country to carry the program at such a pace. Nor has



the Institute the exclusive, or even the first, call upon bar-association effort. Bar associations have many other useful activities which they should and do promote, and, as every one knows, annotation work itself is hard, long, and tedious. Teachers have participated in it in a most helpful way. But obviously there can be no call upon them to abandon all other enterprises to do an annotation in a given subject for their state. There are many things to do in the law. The harvest is great and the laborers are few. The recent article by Mr. Harold Laski in *Harper's Magazine*,<sup>3</sup> called "The Decline of the Professions," demonstrates anew how few the laborers are. If a law teacher is meeting his classes and getting out a casebook or working upon a legislative program for his state or doing any one of the many useful extracurricular things that law teachers do, he, obviously, cannot be reading state decisions and getting out an annotation. Yet the point should be stressed that, in whatever legal field a man is working, a thorough knowledge of his own state decisions and statutes in that field produces an immensely important enlargement of his usefulness. This is not a new idea. Albert Kales talked it a good many years ago and others of us had emphasized it long before the American Law Institute was organized. The proposition is still sound. A lawyer can learn an immense amount that is useful to him by a check of his own decisions and statutes with the Restatement in any given subject, and this is equally true whether his day-to-day work finds him behind a professor's desk in a classroom or in an office for the general practice of law. If he will head up the results of such research into written form so that the product is a state annotation, he has contributed to his own knowledge and the Restatement's practical usefulness, to the mutual benefit of the Institute, the users of the Restatement, and himself.

The considerations underlying this point seem of such high

importance that a few words should be devoted to them, so far as they affect the law teacher, even at the risk of straying from the immediate question of the Institute's future program. In a little more than fifty years the law teacher has changed from a benevolent retired judge or practitioner reading set lectures richly larded with personal anecdotes in a perfunctory class exercise to a position of power and importance in the legal profession. He has done it by years of devoted and intelligent intramural work in the law. As said before, there is still plenty to do. Not that all worth-while effort is limited to reading, analyzing, classifying cases, understanding legal history, and other activities known as orthodox. Certainly we have need of new methods of approach, new systems of terminology, liaison with other fields of social science. But we shall make a mistake so grave as to be catastrophic if a generation of law teachers appears which is afraid to do orthodox work in the law for fear of being thought old-fashioned. Surely we are still lawyers, even though to be good lawyers we have to pick up something of the other social sciences in our stride.

The Institute's organization, method of work, and accomplishments are so familiar to the professional public by this time that elaboration is uninteresting and unnecessary. This discussion is more concerned with a future program than with past accomplishments. But there are two collateral successes of the Institute which should be mentioned here because they bear upon suggestions for its future program.

One is that there has been developed, through experience, an effective way to produce coöperative work in the law. It is not hard to find an able scholar who is willing to work. It is not hard to get committees together who will talk at large (and at length) and pass resolutions. But to get a scholar's work helpfully considered by successive groups in widening circles has

not only been an individual triumph for Dr. Lewis but a distinct achievement for the Institute as well. Already this *modus operandi* has been taken up by other workers in the legal field. It has been adopted by those in charge of Research in International Law and by the committee working on the new federal court rules. It has produced genuine group thought and group responsibility.

The second by-product of Institute experience is its membership. It is country-wide; it contains leaders in the law from every state. It includes, in well-balanced portions, the teaching, judicial, and practising branches of the profession. It is a working membership. Its members read reams of material, write volumes of critical comments, present their views to committees, and discuss them in open meeting. A list of prominent names as window dressing for an enterprise is a too well-known and American phenomenon to excite comment or surprise. But a collection of people of standing who will interest themselves in the technical side of the work is something new, and the Institute has accomplished it.

So much for past history: *Code of Criminal Procedure* finished for the present; the Restatement well under way with nine volumes in print; a tried and successful method of coöperative work in law; a selected working membership of high quality.

What can the Institute do in the future? Already plans for a future program have been drawn and steps taken in the direction of enlargement of activity. These may be mentioned briefly.

First. The initial task is the completion of the Restatement of the Common Law. This involves considerable thought and work along the lines already well established. Questions will arise concerning the choice of subjects that are appropriate for Restatement and the selection of individuals to carry the work along in those subjects. Law teachers and others have been consulted

regarding their views on the suitability of subjects for restatement. The conclusions on the list as it now stands are not necessarily final, and additional suggestions are welcome.

Second. A program of work on the substantive side of the criminal law. This program has been given thought and attention over a great many months. The Institute has had the help of an able advisory committee and has had the benefit of the thought and conclusions not only of lawyers, law teachers, and public administrators but scholars in the fields of sociology, education, and psychiatry as well. The recommendations of this committee are in print,<sup>4</sup> have been considered and approved by the Executive Committee and Council of the Institute, and have been submitted to one of the foundations as a basis for a possible grant of funds to finance the enterprise. If the appropriation is made the Institute will be prepared to do work of value on the legal side of this important and challenging series of problems, and also to make such further coöperative studies and investigations in related branches of learning as is necessary and useful.

Third. Program of coöperation with Research in International Law. Research in International Law has been going forward since 1927 under the auspices of the faculty of the Harvard Law School. This research has now become affiliated with the American Law Institute and the results of the work will, under the working agreement, be brought to the attention of the American Law Institute from time to time as the work progresses.

Fourth. Steps toward coöperation with other agencies for law improvement. The National Conference of Commissioners on Uniform State Laws is a body older than the American Law Institute. Their aims and purposes are not mutually inconsistent, but, indeed, very close together. The beginning has already been made for closer association between the work of the Institute and of the Conference, a method of procedure outlined, and two

subjects for the first joint efforts selected; namely, an act to govern aeronautical flight, and, in the field of property, an estates act. As to procedure, the agreement provides that each body shall appoint representatives to meet from time to time for the purpose of discussing acts which their respective organizations contemplate drafting. At the meetings agreements will be reached concerning the drafting of acts in which the two groups may advantageously coöperate. When the two organizations have agreed to join their efforts in drafting an act, the representatives of each will attempt to agree on a reporter whom they can recommend to their respective organizations. After a reporter has been selected, his advisers will be named by the Institute and the Conference. The draft prepared by the reporter and his advisers will be submitted to the Conference and to the Council of the Institute, respectively, in the customary manner.

Along similar lines is the beginning of coöperative effort with such bodies as the New York Commission on Law Improvement. There has already been consultation with the officers of this organization and it is expected that each group can find subjects on which the work of each will be useful to the other.

Fifth. Creation of a fund to encourage scholarly and scientific legal work. The best statement of this project can be taken from the Report of Director Lewis upon the point as follows:<sup>5</sup>

"The creation of a legal research fund which can be used to encourage men, especially young men of outstanding ability, to study the subjects which we look forward to restating and produce monographs and other writings thereon. The wise expenditure of such a fund would, we believe, not only tend to insure adequate Restatements, but would also, apart from this, of itself advance legal science. It is, we submit, true of law as of the other sciences, that any considerable improvement rests not so much on the plan of improvement, though a proper plan is important, as on the development of men of first-class ability to take part in the work."

Sixth. The drafting of statutes for the improvement of the law. This field of endeavor grows directly out of the experience in the Restatement. The reporters and their committees have found many situations where the law seemed pretty well settled by decision, yet where it was settled in a way that would not meet with approval if the question were to be raised for the first time today. Such a situation in many instances calls for statutory change. The Institute already has a memorandum listing a large number of situations where there seems to be obvious need for legislative action to take the law beyond what restatement could properly do. Whether the work in this field will be done by the Institute independently or in coöperation with the National Conference of Commissioners on Uniform State Laws, or by both, is a question that remains to be worked out in the future. But that there is a field here for useful endeavor there is no doubt.

The above outline of the things which the Institute has already made a part of its plan for future work does not and should not mark the limit of its undertakings. The Institute was organized for the improvement of the law. Necessarily, the type of effort best calculated to produce law improvement will vary from time to time. Some questions will, one may hope, eventually become settled. Certainly new ones will present themselves. To start work in substantive law with the production of the Restatement was a wise decision. No one here ever thought of the Restatement as the be-all and the end-all. It puts the existing common law before the profession, carefully and accurately stated. The product is intrinsically useful. In creating the product the opportunity and the need for other work appears. One of these is, as indicated, to supplement restatement of existing law by amending it through thoughtfully considered legislation. To write such legislation, factual studies and other types of research may, and probably will, be required in many instances.

In addition to all this, there is the great field of the law dealing with court process and procedure. To make this machinery function as well as may be is peculiarly a lawyer's problem and a lawyer's responsibility. Good work is being done by others, but up to now the Institute has touched this area only on the criminal side. Certainly here is an inviting field for scientific effort in the improvement of the law.

One could go on almost indefinitely in describing opportunities. In law, as in other fields of learning involving the relations of human beings with each other, we have come only an infinitesimal distance toward the things we want to know. And unlike those in some other fields, the lawyer has an art of practice as well as a body of learning. Neither the American Law Institute nor any other body or collection of them can solve all our problems. But we may take satisfaction in the fact that in America we have such a body, that it has demonstrated its usefulness by its effort over little more than a decade, and that we may look to it with confidence for leadership on the scholarly side of our professional activities.

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#### NOTES

<sup>1</sup> The second edition of *The Restatement in the Courts*, American Law Institute Publishers (1935), gives a bibliography of papers concerning the Institute and its program; also, as an appendix, a short account of the organization, method of work, and other facts.

<sup>2</sup> A statistical summary of such adoption was published in (1935) 21 A.B.A.J. 255.

<sup>3</sup> (1935) 171 HARPER'S 676-685.

<sup>4</sup> See AMERICAN LAW INSTITUTE REPORTS IN RELATION TO FUTURE WORK: 1935.

<sup>5</sup> See *ibid.*

# THE OLD REGIME AND THE NEW IN CIVIL PROCEDURE

ROBERT WYNESS MILLAR

"Il ne suffit pas à un État d'avoir de bonnes lois, il faut aussi des moyens pour que l'exécution en soit aisée, il faut que la marche en soit commode; il est besoin de prévenir les chicanes, l'astuce de ceux qui auroient intérêt à entraver les dispositions de la loi. Des formes trop minutieuses, trop subtiles, trop longues, ne conviennent jamais, il faut les élaguer, les bannir: seule la simplicité doit triompher."

Galli in *Exposé des motifs du Code  
de procédure civile* (1806).

## INTRODUCTION

TO ensure that "justice might walke in a shorter and more compendious way" is an end to which effort has been bent at all periods of legal history. It has engaged the attention of Roman emperors and medieval popes; it has been a first care of enlightened heads of State in recurrent strivings. But down to the nineteenth century, if we lay aside the frustrated ambitions of Oliver Cromwell in this direction, it is on the Continent rather than in England that the desire to ameliorate the conditions of civil justice is seen attaining to any degree of fervor. England can point to no *Clementina saepe*, no *Jüngster Reichsabschied*, no *Ordonnance civile*, no such spectacular attempt at procedural reform as that which Frederick the Great, hearkening to the litigatory sorrows of the miller Arnold and others in like cases, instituted for his Prussian dominions. Nor do her chronicles tell us of any such fifteenth-century Bentham as was, for France, the very learned bishop of Lisieux, whose project for the abbreviation of



civil proceedings saw the light in 1455.<sup>2</sup> Improvements she gradually effected, but of these none was heralded with trumpet, few were of legislative birth. No statute signalized the rise to curial life of the chancery; no statute originated its procedure. For common-law judicature some items of legislation are hornbook learning: the Statute of Marlbridge (1267), the Statute of Westminster II (1285), the Statute of 27 Elizabeth (1585), the Statute of 3 and 4 Anne (1705), the Statutes, generally, of Amendments and Jeofails, the act authorizing the setoff of mutual debts (1729), but when we have named these we have named all of any basic import. No one of them is organic or structural; no one of them is at all path-breaking in any vital sense, not even the Statute of Westminster II in its enlargement of the cycle of actions, for this was no more than the limited resumption of an old but halted process. The whole is characteristic of the people: like the British constitution, the English procedure has come into being, has evolved its methods, has settled its rules with scant aid from paper declaration.

It might be supposed that the passion for codification of civil procedure, which toward the end of the eighteenth century was producing conspicuous manifestations in the German States, in Austria, and in the States of northern Italy, would have transmitted some germ of contagion to English minds. These, however, were too well guarded by an insular immunity. Something of the Neo-Roman law England already knew: in the ecclesiastical and admiralty courts she had her own closely fenced civil-law preserve. But to the general body of English practitioners the doings therein were strange antics, to be looked at with a certain indulgent scorn, not always unmingled with a measure of levity.<sup>3</sup> When, in the sixteenth century, the accomplished author of *De Republica Anglorum* wrote of the common-law production of issues that, in all his inquiries in France and elsewhere, "to find

howe that long suites in law might be made shorter, I have not perceived nor reade as yet so wise, so just and so well-devised a meane found out as this by any man among us in Europe,"<sup>4</sup> he struck the note to which the English legal world continued to be attuned. Convinced of the superiority of her own judicial institutions—a conviction which the work of Blackstone had done much to solidify—it is nowise remarkable that England, forgetting what her formative period had owed to these very influences, should disdain ideas of outland provenience and hold herself aloof from emulation of contemporary Continental movements. Nor could the case be much otherwise in America where these institutions had been transplanted. Stirrings from within there were on both sides of the water, the stirrings that were ultimately to result in autonomous reform, for one country and the other, but not until a later day do these put on any degree of strength.

#### THE OLD REGIME AND ITS PREPOSESSIONS

##### I. *The Old Regime in England*

So it is that England entered the nineteenth century with the system of civil justice which this manner of growth had created. To the objective eye, a system bizarre enough despite the solid merits which lie behind its baroque façade. For the outsider, what first bewilders is the dichotomy of jurisdiction, the separate administration of common law and equity. The jurist trained in a Roman-descended system is familiar with the idea of equity, but for him it is the element that supplies the deficiencies or corrects the rigors of the legal rule in the very application of that rule; it represents the *nobile officium judicis* that prevents the legal rule from working an un contemplated injustice, not something to be invoked collaterally to the administration of the legal rule: always it is coadjuvant and coefficient. To one so trained, how strange

the phenomenon of equity being administered in a separate court, not even a court of supervisory or corrective jurisdiction; how startling the idea that, by the law of the land, a man may be the owner of a thing in one court and not in another, that, by the same token, one court, in an action pending before it, will be oblivious to a defense that another court will recognize and protect! And when he learns, resultingly, that "in many cases parties in the course of the same litigation are driven from courts of law to courts of equity and from courts of equity to courts of law,"<sup>5</sup> acute, indeed, would be the foreign observer who could here discern the earmarks of a well-ordered system. Little wonder that a learned French magistrate, visiting the English courts in the third decade of the century, could refer to the separation as a factitious thing, and speak of the Court of Chancery as "a useless and embarrassing superfoetation, adapted only to originate conflicts and a confusion of jurisdiction, detrimental to the true interests of the litigants."<sup>6</sup> But the notion of this separation, despite its accidental origin, had been so bred in the bone of the legal profession, as it is still to a not inconsiderable extent in America, that it wore the aspect of something dictated by nature, something integral to the processes of civil justice.

If we turn to the common-law courts, we see here a procedure, with jury trial as its nucleus, affording a striking contrast to anything known on the Continent. Its action system, comparable only to the most ancient Roman—that of the *legis actiones*—offers to the intending plaintiff a variety of pigeonholes rigidly partitioned, each for the reception of a particular manner of demand. If he chooses the wrong one, disaster may be the result. If his demand will fit in none, let him go hence; perhaps the Court of Chancery will aid him, perhaps not—it is all one to the court of common law. These pigeonholes represent the forms of action, brought into being by the royal letters known as the original writ

and crystallized into precedent by the aid of the *Registrum Brevium*. Aforetime they were highly numerous: time and change have reduced their active list to a comparatively small group. Debt, covenant, assumpsit, trespass, trespass on the case, trover, detinue, replevin, ejectment find frequent employment. A few others occasionally appear, but those named are the everyday actions, principal survivors of a once mighty host. Mark, also, that this scheme of actions, though extending to the controversies of most common occurrence, covers but a limited field of judicature. It permits a plaintiff, satisfying the requirements of legal interest, to obtain an award of money, of personal property, of real property; beyond this it can seldom go. It can give him no preventive relief, it has no means of adjusting conflicts of rights other than in terms of recovery or nonrecovery of the thing demanded, and even where it concedes specific recovery of property its processes lack a full measure of effectiveness.<sup>7</sup>

Here, too, flourishes uniquely that recondite method of preparatory allegation which we call common-law pleading. Allegation in the systems of other lands is an humble servitor, dismissed when it has discharged its purely informative function; here it is lord and master, tyrannizing over the substantive law, at times trampling it under foot. The roots of its prepotence are to be found in its lineage. Alone of the Germanic nations, England has preserved the Germanic idea that the parties themselves, by their mutual averments, shall formulate in concrete terms the theme of decision. Out of the crudity of the old *thwert-ut-nay*, through coalescence of Romano-canonical borrowings with the Germanic rule that whatever is not denied stands admitted, there has long ago emerged the principle requiring the parties to plead either by way of traverse or by way of confession and avoidance. And, just as in the old Germanic system the contraposition of assertion and denial had furnished the very terms of the formula to which was

addressed the oath of the party or, within the narrow sphere of witness activity, the oath of the witnesses, so here the interplay of party allegation has for centuries been evolving, in the production of issue, the theme for the sworn declaration of the twelve, themselves the descendants, through the Norman inquest, of the Germanic community witnesses. From Germanic rudiments has come the demurrer—an institution with no precise Continental counterpart—by which, on a point of law, the proceeding might often be brought to an abrupt and sometimes untimely end. As on the Continent, place has been given to preliminary defenses of fact—the dilatory pleas of the common law—although in this regard the union of Germanic and Romano-canonical ideas has engendered a sullen brood, ruled for the most part with an iron hand.

But around the central principle of progression to issue there has been contrived a discipline artificial and intricate and not always consistent with itself. The necessities of regulation have emphasized the requirement of singleness, so that the jury might not be perplexed by a multiplicity of points—a requirement alleviated in the case of the plaintiff by the use of plural counts; in the case of the defendant, from 1705 on, by the permission to plead more than one plea. Counteracted, too, it has been, by the recognition, wholly at war with the requirement itself, of the so-called general issues, no two of which have precisely the same range and which in the most commonly used actions—assumpsit and trespass on the case—utterly falsify the idea of presenting a single point for decision. Moreover, no principle dictates what matters may or may not be admitted in evidence under a given general issue: resort must be had to the arbitrary rule applying to the particular form of action. This arbitrariness is matched in the case of the replication *de injuria*, the thorny doctrines of which had come to expression in *Crogate's Case*.<sup>8</sup> Not much is there of

exaggeration in the satirical gloss which divides the cases of this replication into those: "First, when *de injuria* may clearly be replied. Secondly, when it clearly cannot be replied. Thirdly, when it is probable that it may be replied. Fourthly, when it is probable it cannot be replied. And, fifthly, when it is altogether doubtful whether it can or cannot be replied." A mingling of logic and illogic, not untinged by tricklings of medieval scholasticism, appears throughout the whole discipline. It has yielded the special traverse with its enigmatic negation, the plea to the further maintenance of the action, the plea *puis darrein continuance*; has elaborated the learning of profert and oyer, of color, of protestation, of duplicity, of anticipation, of departure, of new assignment, of replader, of aider, and other like positive and negative phases of enginery; has, in short, constructed an arcana of forensic statement penetrable only by the initiate.

The very language of allegation is strange. Pleading talks with a Latin accent, barbarian not Ciceronian. When, as a result of the statute of 1731,<sup>10</sup> English was substituted for Latin as the medium of averment, what the practitioners largely did was to adopt as nearly literal a translation as possible of the forms of allegation theretofore employed. Hence it is that we have such expressions as "force and arms" and "breaking the close"; hence it is that there appears such an un-English locution as that "with feet in walking" (*pedibus calcando*) the defendant wasted the plaintiff's grass. In allegation, too, legal fiction finds commodious lodgment. Witness the common counts in assumpsit solemnly averring the making and breaking of promises inexistent save in juristic metaphor; the losing and finding which every declaration in trover must charge, be the circumstances of conversion what they may or its subject a paper of pins or a thousand tons of coal; and the lease, entry, and ouster which in ejectment give impulse to the marionette figures of John Doe and Richard Roe. Fiction,

indeed, is the constant substitute for what rationally should be alternative allegation, looking to the avoidance of accidents of proof: the plaintiff may state his claim in different ways, but for each variant statement is compelled to suppose a distinct happening, contrary to the fact.

Moreover, as part of its Germanic legacy, England has inherited something of the Germanic notion that in litigation the parties are acting at peril. *Ein Mann, ein Wort* has had here its echoes. All intendments are against the pleader, at least until after verdict, for, says Coke, "everie man is presumed to make the best of his owne case."<sup>11</sup> The possibilities of recovery from a false step were always restricted; after the change from oral to written allegation this restriction had become intensified. Thus the demurrer avails to attack faults of form as well as of substance; decision of the question of form may well end the case without inquiry into the merits. Only by the indulgence of the court in forestalling actual decision and allowing withdrawal of the demurrer, on the one hand, or an amendment, on the other, can finality be averted. So, where the action is met by a dilatory plea, if the issue of fact to which this gives rise is once decided in favor of the plaintiff, the defendant inevitably loses the cause, although he may have had a perfect defense on the merits. But if such a plea, constantly stigmatized as odious, is defeated on demurrer, the defendant is entitled to another chance. A grotesque inconsistency this, for that chance would be denied him had his plea not been one of the odious class. Amendment of allegation, however seasonably sought, is allowed none too freely, and down to the statutes of 1828 and 1833<sup>12</sup> cannot be had at all once the record is made up for trial. Except in the simplest cases, the plaintiff can never be quite sure that his demand will attain the stage of trial, the defendant that some inadvertence will not see him cast *in toto*. So extreme is the intricacy, so meticulous the learning of this art of pleading, that

its pursuit is generally in the hands of specialists, the so-called special pleaders under the bar—a tribe we would expect to see honored; instead, we find them esteemed by their brethren only as a useful variety of drudge.<sup>13</sup>

Different, however, is the picture when we look at the trial. In the *viva voce* examination and cross-examination of witnesses in open court, with their demeanor and mode of speech directly appreciable by the organs of decision, is present the method that yields all those advantages of orality, immediacy, and publicity to which contemporary Continental reform is already beginning to aspire.<sup>14</sup> Despite the as yet unmodified asperities of the rules of evidence, its superiority over the deposition method of the Continental courts and of certain English tribunals is too manifest for comment. This is the great virtue of the common-law system, going far to redeem it from the faults which, in other directions, it so strikingly discloses.

What, then, of the Court of Chancery? Here a Continental observer would feel more at home, encountering, as he would, a system not far removed from his own: the same absence of forms of action, a similar taking of evidence in writing, and, except when the aid of a common-law court is invoked for advisory purposes, the same mode of fact decision. Here, too, he would find the invaluable institution of discovery, descendant, like its Continental counterparts, of the Romano-canonical procedure of positions. The method of pleading, however, has peculiarities of its own. Ingress of common-law notions has furnished the demurrer and the plea. These and the answer are the pleading weapons of the defendant; but the answer is also the vehicle of discovery, and as a consequence the elements of discovery and of pleading proper have become so entangled as to cause frequent confusion. Of acting at peril there is comparatively little: false steps may usually be retrieved; but the system has its own arbi-



trarinesses, as evidenced by the rule that, even in the teeth of acknowledged law, the complainant is held to admit the legal sufficiency of a plea by the mere fact of taking issue upon it. The pleadings, though stopped at the replication, are of inordinate length: the tendency to repetition is exemplified by the nine parts of the bill, constituting, as commonly said, a tale thrice-told. Appalling such a document to a layman, though perhaps an excess of violence attended the reaction of John Wesley when he spoke of seeing "that foul monster, a chancery bill."<sup>15</sup> The taking of evidence in writing, as here practised, is a cumbersome and tedious operation; the examination of witnesses is conducted in secret by means of interrogatories and cross-interrogatories submitted by the parties, and the method involves the absurdity of cross-interrogatories formulated without knowledge either of what the direct interrogatories will contain or of what they will elicit. There is a wholly unnecessary multiplication of steps throughout; periphrasis and diffuseness mark the whole system.

In point of remedy, the chancery is able to supplement the common law with substantial adequacy once it attains to definitive action. But the result of its modes of progression is delay and enormous expense—delay comparable only to that of the Imperial Chamber of Justice of the Holy Roman Empire which, when the court sat at Speyer, evoked the quip "*Spirae lites spirant et non expirant*." An interesting testimony in this respect is afforded by the case of *Godfrey v. Saunders*<sup>16</sup> in 1770, wherein it appears that the plaintiff, after having "exhibited a bill in chancery against Saunders for an account, which hath been fruitlessly depending there for more than twelve years," turned at last to the Court of Common Pleas, seeking his remedy in the all but obsolete action of account, and, it may be added, recovered final judgment in that court in something less than two years. Even half a

century later, four years' time between the date of setting for hearing and the date of decree is nothing unusual; sometimes the passage of fifteen years may see a matter still undisposed of.<sup>17</sup> The insistence upon proceedings by way of revivor and supplement in the case of the death of any of the usually numerous parties is a constant source of addition to the normal retardation.<sup>18</sup> Indeed, the situation is such as to draw from an authoritative source, as late as 1839, the observation that "no man, as things now stand, can enter into a chancery suit with any reasonable hope of being alive at its termination, if he has a determined adversary."<sup>19</sup> And this is not a court, like the German tribunal we have mentioned, remote from the everyday life of the people. There come to it, and must come to it, the most vital questions of private property and personal relations: in point of the pecuniary value involved in individual cases it has to do with the most important segment of the judicial business of the country. But within its anaconda-like convolutions rights are smothered and die. The tragic picture painted by Dickens in creating for us the case of *Jarndyce v. Jarndyce* is not a misrepresentation.<sup>20</sup>

## 2. *The Old Regime in America*

In America, by the opening of the nineteenth century, the crude administration of matters judicial obtaining in the early Colonial period, characterized in Massachusetts and Connecticut by a dependence upon the *Pentateuch* and influenced elsewhere to a varying degree by intuitive notions of justice<sup>21</sup> rather than by any strict adherence to the laws of the mother country, has given way to an acceptance more or less complete of the English legal system and with it of English civil procedure. Yet desire for plainer methods, on the one hand, the more pressing because of the undeveloped state of the bar, and a certain jealousy of judicial

power, on the other, have produced in the procedure modifications of not inconsiderable moment, the complete history of which even today remains unwritten.

The chancery jurisdiction which was the subject of irregular and intermittent exercise in Colonial days, usually by the governor and council, sometimes by the assembly, sometimes by special courts of precarious tenure, sometimes by limited delegation to the ordinary tribunals,<sup>22</sup> is now, for the most part, a regular branch of judicature. Ordinarily, as in the federal judicial system, it is exercised by the same court that has common-law jurisdiction, but as a wholly distinct activity; in certain of the states, however, as in New York, the Court of Chancery is a separate tribunal. But that fear of chancery, which was influential in pre-Revolution times, has left its imprint in various quarters. In Massachusetts, Maine, and New Hampshire this jurisdiction is granted by the legislature only in niggardly installments; anything like a complete equity jurisdiction is slow of attainment.<sup>23</sup> Pennsylvania, at the time of which we speak, has neither a court of chancery nor a chancery jurisdiction. Put to it, the common-law courts have done much to remedy the omission. The result is a curious anticipation of future general reforms. The assignee of a chose in action may sue in his own name; equitable defenses, such as misrepresentation and mistake, are permitted in common-law actions; an equitable title suffices in replevin and ejectment; the court, on rule to show cause, will often set aside a judgment on equitable grounds; and other phenomena of what a later day will call fusion between the two jurisdictions perforce make their appearance. But, bold as this course has been, it is not bold enough, and the lacuna which it leaves is not to be filled until the explicit grant to the courts of equitable powers by a process that begins in 1836 and is completed in 1857.<sup>24</sup> In Georgia, the same fear comes to different manifestation. Here a check upon the

supposed arrogance of chancery is found in making issues of fact in equitable causes triable by jury as a matter of right.<sup>25</sup>

But Georgia has been pursuing her own way in another direction. By certain legislation of the latter years of the eighteenth century, culminating in the Judiciary Act of 1799,<sup>26</sup> she has provided for the conduct of all civil actions by petition setting forth the demand "plainly, fully and substantially" and by answer, on the part of the defendant, setting forth in like manner all necessary matters constituting "the cause of his defense." The effort thus displayed to assimilate common-law and equity pleading and to discard the common-law forms of action has, however, been successful only to a limited extent; the legislation has not been sufficiently definitive to prevent the courts from adhering, in large measure, to the traditional distinctions. So far as the boundaries of the common-law actions are concerned it has resulted in little more than the recognition of "petitions in the likenesses of those several forms of action."<sup>27</sup> But the legislation has decidedly curtailed the special pleading of the common law, for, under its terms, although the case is otherwise as to defenses in abatement, no replication is allowable to an answer on the merits: in the event of an affirmative defense the issues must define themselves from the evidence.<sup>28</sup> An interesting departure is thus disclosed which, under better auspices, might have materially changed the general course of reform in America.

Other jurisdictions exhibit modifications of lesser compass. To be noted for the chancery is the authorized waiver of answer under oath exemplified by the New York enactment of 1828, as also the New York rule-provision of 1839 applying, as between bill and answer, the common-law principle of admission by non-denial; especially notable the unsuccessful attempt of the Federal Judiciary Act of 1789 to install "oral testimony and examination of witnesses in open court" as the method of chancery trial—a

measure which is ultimately to triumph, but in the federal jurisdiction not until 1912. On the common-law side, while recognition of the right of setoff is now universal, it is interesting to observe that Virginia has anticipated the English statute by nearly a hundred years in her provision of 1644 for this defense where the plaintiff is debtor to the defendant upon a "bill, bond or accompt." The same state, breaking with a leading principle of the common-law system, has in 1788 accorded the defendant the right to plead and demur at the same time. So, too, she has already laid the basis for that proceeding by notice and motion<sup>29</sup> which in after years is to become her favorite mode of conducting common-law actions. Kentucky in 1805 has originated, for actions upon bonds and notes, the proceeding by petition and summons<sup>30</sup> which, although finally to perish, acquires for a time considerable vogue both within and without its native jurisdiction. An awakening recognition of the need of discovery in common-law actions has resulted here and there in remedial steps, at first for minor causes as in the case of the South Carolina summary process,<sup>31</sup> later for causes in general, beginning, perhaps, with the Mississippi statute of 1828.<sup>32</sup> Certain jurisdictions (*e. g.*, Connecticut, 1720, 1731)<sup>33</sup> have enlarged the common-law scope of the general issue in particular cases. Moreover, in sundry quarters place has been given to a "brief statement" (*e. g.*, Massachusetts, 1793; Maine, 1831) or notice (*e. g.*, New York, 1801; Massachusetts, 1836) accompanying the general issue, as a substitute for special pleas in bar.<sup>34</sup> And mention should also be made of the wide adoption of the rule that before a defendant may deny execution of the instrument sued upon he must make oath to his plea.

In America, therefore, the old regime appears with the traditional rules variously tempered. Betterment is being sought, but, apart from the not altogether prosperous experiment in Georgia, no essential change in plan or structure is being attempted; the

reforms are still in the realm of patchwork. Due to the simpler organization of the courts and their officers and, in particular, to the localized administration of justice, the path of the litigant is not as difficult as it is in the mother country: certainly we hear of no such inordinate expense and delay in chancery suits as constitute the nightmare of contemporary England. Yet, after all, the general basis is the transplanted system, with its separate administration of law and equity, its artificial mode of common-law pleading, its repetitious and circumlocutory chancery processes.

#### THE PASSAGE FROM THE OLD TO THE NEW

The tale of the reform movement in England and America, as it came definitely to shape itself, is a long one and in its principal chapters has often been told. It brings before us the celebrated speech of Brougham in the House of Commons in 1828, the posthumous but pervasive influence of Jeremy Bentham, the undiscouraged persistence of David Dudley Field, the skill in reconstruction of Lord Selborne and his associates. In England, as its legislative point of departure, may be taken the act of 1832<sup>35</sup> prescribing uniformity of initial process in common-law actions, immediately followed by the two acts of 1833 introducing a limited measure of other improvement, the one<sup>36</sup> in the common-law procedure, the other<sup>37</sup> in the procedure of chancery. Then it notes that ill-starred offspring of the preceding year's common-law act, the Hilary Rules of 1834, a measure which mistakenly saw a means of progress in the sharpening of the central principle of common-law pleading. Next it leads through the salutary innovations effected, for the one jurisdiction, by the Common Law Procedure Acts of 1852, 1854, and 1860,<sup>38</sup> and, for the other, by the Chancery Practice Amendment Act of 1852<sup>39</sup> along with lesser legislation. And, finally, it has its substantial culmination in the great Judicature Acts of 1873 and 1875.<sup>40</sup> In America, after the

scattering prelude we have mentioned, it is the New York Code of Procedure of 1848<sup>42</sup> which is the positive point of legislative departure. Here the tale continues by recounting adoption of the system of that code in state after state until this has come, basically at least, to prevail in the decided majority of American jurisdictions.<sup>43</sup> It would then refer to the more conservative attitude of a minority of the states and their resultant exhibition of a wide variety of gradations between the old and the new, and could speak even of a few jurisdictions whose civil procedure still discloses but slight advance upon the English methods of 1830. Conservatism, too, it would predicate of the federal system, mitigated, on the one hand, by the Conformity Act of 1872, on the other, by the drastic reform of the chancery practice in 1912, but would not fail to record the high hopes originating in the provision for new rules enacted in 1934.

The American reform of 1848 unquestionably had its influence upon English development and, in exchange, the more recent American legislation has profited by the progress made in England. But, all in all, it is clear that the monument which marks the decisive break with the old order is, for America, the New York Code of 1848; for England, the Judicature Act of 1873. For the jurisdiction which it was intended to govern, the American statute represents reform *uno ictu*; the English, in contrast, came as the result of a gradual progression. And from this fact, there can be no doubt, the modern English procedure has drawn certain distinct advantages.

#### THE NEW REGIME AND ITS ENDEAVORS

##### 1. *The Fusion of Law and Equity*

Before the point of break with the old order, phenomena of fusion between the common-law and equity jurisdictions had

manifested themselves both in England and America. It is familiar learning that the common-law courts had been domesticating certain equitable principles, as in the recognition of equitable estoppel, the adaptation of the action of assumpsit to demands *ex aequo et bono*, the entertainment of actions upon lost instruments, and that, on the other hand, the court of equity, more especially in America,<sup>43</sup> would not always withhold its hand from applying a certain measure of relief, native to the courts of the common law, if necessary, by way of supplement, to a complete disposition of the cause before it. We have noted also the situation obtaining in Pennsylvania, where the absence of a chancery jurisdiction had compelled administration of an important quota of equitable principles in common-law actions. Interesting, moreover, is the case of Texas, whose inhabitants, although accepting the Anglo-American law in general, had been so impressed with the procedure of petition and answer which they found in the Spanish-Mexican system as to discard virtually from the outset any separation of law and equity.<sup>44</sup> In England, the Chancery Practice Amendment Act of 1852 had effectively empowered the Court of Chancery to deal with certain common-law questions whose decision was prerequisite to the exercise of equitable jurisdiction. And, correlatively, the Common Law Procedure Act of 1854 had bestowed upon the common-law courts, as incident to their cognizance of common-law actions, a limited degree of jurisdiction in the matter of specific performance and injunction, and had accorded place to equitable defenses in answer to common-law demands.

But in America, the case of Texas apart, fusion in any degree of fullness first came with the New York Code of 1848; in England it first came with the Judicature Act of 1873. The American statute, as its main provision in this regard, declared that "the distinction between actions at law and suits in equity, and the forms



of all such actions and suits heretofore existing, are abolished; and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action."<sup>45</sup> With exception made for rights of action residing in an executor, administrator, trustee of an express trust, or a person vested with express statutory authority to sue, it also declared that "every action must be prosecuted in the name of the real party in interest."<sup>46</sup> And these provisions in substance have been carried into the mass of the American codes.<sup>47</sup> The English statute proceeded differently. It explicitly faced the fact that, owing to the manner of the law's growth, the distinction between legal and equitable rules, though purely artificial, had so embedded itself in the fabric of the law as to be insusceptible of any outright abolition, and that what really was being aimed at in speaking of fusion was the concurrent administration of the two kinds of rules in the same suit when the circumstances so required. Resultingly, it enacted that "in every civil cause or matter . . . law and equity shall be administered" according to a series of detailed provisions which followed, covering the various contingencies calling for that concurrent administration.<sup>48</sup> To this was added a section regulating certain special situations involved in the change, which concluded with the significant declaration that "generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail."<sup>49</sup> Thus equity, as before, was to have the last word, but now that word was to be spoken in time to foreclose the adverse word of the common law. This difference between the two statutes in the manner of approach accounts in some measure, at least, for the smoother working of the English system in the present regard.

In both systems it is clear that there may be a union of legal and equitable demands, subject to the relative provisions regarding the joinder of causes of action. It is equally clear that any equitable defense—that is to say, any set of facts which, under the old order, would have been ground for an application to a court of equity to restrain the prosecution of a common-law action on the particular demand or the enforcement of a common-law judgment rendered upon it—may be the subject of direct cognizance in the action itself, either by way of answer or by way of counterclaim. But, while it is basically true of both systems that in the conduct of actions an equitable title will be given effect over the legal where no substantial reason exists to the contrary, difficulties arise under American code practice in various cases where the facts established admit of one manner of remedy when gauged by the rules of the common law and of another when gauged by the rules of equity. Here most of the American courts are strongly disposed to insist upon the consequences of the identification that the plaintiff either has or is supposed to have given to the action as one at law or in equity. This is due in part to the rigid preservation of the right of jury trial in common-law causes, in part to the theory of the case doctrine later to be mentioned, in which regard it is put upon the ground that the allegations and proof must agree. An extreme manifestation is the statement by one court that “in order that equitable relief may be had, equitable pleadings must be interposed.”<sup>50</sup> No such rigidity of attitude characterizes the English system. Though the precise question was in relation to different common-law remedies, note what was said by Lord Justice Scrutton in *Oakley v. Lyster*.<sup>51</sup>

“ . . . I begin by ascertaining the facts in order to see whether the form in which the plaintiff is claiming is substantially right, or, if not substantially right, whether any injustice is done by giving him the real remedy which the facts justify.”

And having in mind *City of Syracuse v. Hogan*<sup>52</sup> in the New York Court of Appeals where the majority found it necessary to hold that the action was one in ejectment, although the case was such that Cardozo, J., dissenting, could consider it an action in equity to enjoin a highway obstruction, contrast the words of Lord Blackburn in *Pugh v. Heath*:<sup>53</sup>

"Some twenty years ago there might have been some difficulty, in this case, in saying whether the proper form of remedy was by ejectment at law or by a suit in chancery; but now it is quite immaterial which of the two it is, if it can be shewn that there is a remedy, and I perfectly concur in the judgment . . . that there is a remedy in one way or the other, and it does not matter which."

It was the question of jury trial that directly produced the result in *City of Syracuse v. Hogan*, and it is not to be disputed that the constitutional preservation of jury trial as it existed at common law, with the statutes passed in pursuance of it, is a circumstance constantly militating against completeness of fusion. Yet in England down to 1932 the parties continued to have under the Judicature Acts and the relative Rules "an absolute right to a jury trial in all pure common-law actions"<sup>54</sup> without there arising any such impediment to fusion as has thus come to obtain in America. Undeniably, the different nature of the restriction upon the courts' freedom of action has had much to do with the difference in outcome, but there can be little question that the American courts have often construed the entitlement in a manner sacramental rather than substantial. As part of this chapter, difficulties appear concerning the allocation of fact decision as between judge and jury where legal and equitable issues are combined. In this respect some encroachment of the jury upon the true province of the judge is here and there perceptible, but the questions emerging are still to a certain extent open and, in any event, are detrimental

to a well-ordered procedure. For these questions the English system has little place; in general the discretion of the court is all-controlling.<sup>55</sup>

No doubt a way out of the embarrassment occasioned by the diversity in mode of trial lies in appropriate modification of the constitutional provisions, but this is not at all likely soon to be achieved. Meanwhile, the diminishing incidence of jury trial due to waiver by the parties, forwarded as this has been through introduction of the necessity for a jury demand or, more cogently, through the latter plus the exaction of a special jury fee from the demanding party, is tending to reduce obstruction in this sphere. And, obviously, in Georgia and in those few states which, like her, have extended to the parties the right of jury trial in case of equitable as well as legal issues, namely, Texas, North Carolina, and Arizona,<sup>56</sup> the matter of fusion, in this respect, rests upon an easier basis. But no degree of uniformity in mode of trial will yield the desired maximum of fusion until there is a complete abandonment of that overdriven insistence upon agreement between *allegata* and *probata* which characterizes too many of the American courts.

As thus appears, the general system which found its origination in the New York Code contemplates the union of legal and equitable demands as well as of legal and equitable defenses. It obtains in most of the so-called code states and in somewhat different forms under the practice acts of Connecticut and Illinois. But in Kentucky, Iowa, Arkansas, and Oregon<sup>57</sup> there is followed a system of narrower compass. In these jurisdictions the court has definitely a law side and an equity side, the statute itself distinguishes between actions at law and in equity, and there may be no union of legal and equitable causes of action. On the other hand, an action at law may be met not only by an equitable defense but also by an equitable counterclaim or cross-complaint, misjoinder of

causes of action is waived if not initially objected to, and provisions exist facilitating the transfer of causes from one side of the court to the other. Hence, while the door to fusion is not wide open, it is open in a decided measure, especially in view of the potentialities of the equitable cross-action.

Only slightly ajar is the door in another type of American jurisdiction. Here, apart from the possibility of transfer from law to equity or vice versa by formal amendment of the pleadings, the sole concession to the new order in the present regard is in the authorization of equitable defenses in common-law actions. But just as under the like provision of the English Common Law Procedure Act of 1854 it was held that this extended only to such defenses as were an unconditional bar to the action,<sup>58</sup> so the efficacy of the American statutes has in general been similarly circumscribed. In one case, at least, that of Massachusetts, the limitation has come from the statute's own wording; in other cases as a result of judicial construction,<sup>59</sup> to the usual course of which stands out in brilliant relief the decision of the United States Supreme Court in *Liberty Oil Co. v. Condon National Bank*,<sup>60</sup> passing upon the federal statute of 1915.

The events of the last hundred years, however, teach that all such partial measures are but stages in a progression to the ultimate merger of the two jurisdictions, a merger which for the federal system is already in the offing as attested by the Supreme Court order of June 3, 1935,<sup>61</sup> following Chief Justice Hughes's notable pronouncement of the preceding month.<sup>62</sup> And while some American jurisdictions there still are which have not made even the minimum approach last noted, these, too, are bound in time to reach the common goal. As witness may be cited the case of Illinois, which, in 1933, swung from a conservatism more pronounced, perhaps, than that of any other Anglo-American juris-

diction to an acceptance of merger whose approach to completeness ranks it among the most advanced in the country.

## 2. *The Joinder of Causes of Action*

According to the rule of the common law, joinder of causes of action was limited to the case where all fell within the same form of action, with the two exceptions, accounted for historically, that detinue might be joined with debt and trover with trespass on the case. In chancery, there prevailed, in striking contrast, the rule which restricted the union only by the elastic test of multifariousness. In America, departure from the old rules definitely came with the New York Code of 1848. This, for its unified procedure, set up a new system of joinder—a system which, as the event has proved, was needlessly complicated and inflexible. As amended in 1852, it provided for a joinder of all claims which “arise out of the same transaction, or transactions connected with the same subject of action,” and then, for claims not having this common origin, established six other classes into one of which the situation must fit before a joinder was allowable.<sup>63</sup> The latter regulation was especially ill-advised. Thus, unless there existed the common origin indicated, it would not permit, for example, the joinder of a claim in contract with one in tort, or one for injury to character with one for injury to the person, or one for the recovery of real property with one for the recovery of personal property. But this group system, with variations, is that which continues to be followed in most of the American code jurisdictions. An early adoption of a different system appears in the case of Iowa. Here, dating from the Code of 1851, there may be a free joinder of legal causes of action on the one hand, or equitable causes of action on the other, subject to the power of the court to direct separate trials. A similar rule has obtained in Michigan since 1915. A like freedom of joinder, without reference to any distinction between

law and equity, was adopted by Kansas in 1909 and by Wisconsin in 1915.<sup>64</sup> Usually, however, it is a condition of the joinder, under the systems noted, that the several causes of action shall have identity of plaintiffs and defendants: as commonly provided, they "must affect all parties to the action." And, for the most part, there is further expressed the requirement that all shall be triable in the same venue. Another system of which note should be taken is that of Texas. From an early day its courts have followed a doctrine that governs the matter of joinder by what is substantially the test of convenience in the particular case. This result appears to have been influenced by the equity test of multifariousness, not unaided by the Spanish rule in reference to cumulation of actions.<sup>65</sup>

In England, innovation in this field began with the Common Law Procedure Act of 1852. This permitted the joinder, apart from *replevin* and *ejectment*, of common-law "causes of action of whatever kind, provided they be by and against the same parties and in the same rights," with power in the court to direct separate trials.<sup>66</sup> On this modified basis the English law remained until the Judicature Acts. For the now fused procedure the Rules of 1875 expanded the principle thus introduced in 1852 by providing that "the plaintiff may unite in the same action and in the same statement of claim several causes of action." Leave of court, however, was required for the joinder with a claim for the recovery of land of any other than a money claim in connection with the defendant's holding of the land, and for the joinder of a claim by a trustee in bankruptcy as such with one by him in any other capacity. Certain specific authorization was given for the union of joint and separate claims, as also of claims by or against an executor or administrator as such with claims by or against him personally. Separate trials might always be ordered, and the defendant was to be at liberty to move for the exclusion of any cause of action where this stood in the way of a convenient disposition of the whole.<sup>67</sup>

These provisions, without change in substance, passed into the revision of 1883 as Order XVIII, and, with minor amendment, continue in force.

Standing alone, Order XVIII did not countenance, except to the slight degree indicated, any departure from the principle that forbade the joinder of actions with diversity of plaintiffs or defendants. Under its terms, for example, a cause of action in favor of *A* could not be united with a cause of action in favor of *B*, nor a cause of action against *C* with a cause of action against *D*. But the contention was advanced that the very effect of permitting such a joinder attended the rules relating to the joinder of parties (Order XVI) by virtue of their authorization of joinder of parties by or against whom any right to relief is asserted "whether jointly, severally, or in the alternative." In consequence of certain decisions<sup>68</sup> of the House of Lords denying this contention, Order XVI was amended in 1896 so as to make it apply to joinder of actions as well as joinder of parties. In terms the amendment affected only Rule 1 of Order XVI relating to the case of plaintiffs, but by construction is held also to apply in respect of Rule 4 of the same order relating to joinder of defendants.<sup>69</sup> As thus amended, Rule 1 now provides that

"All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the court or a judge may order separate trials, or make such other order as may be expedient. . . ."<sup>70</sup>

The outcome, therefore, is that, under the English system, subject to the court's application of the standard of convenience, not



only may there be an almost unlimited joinder of claims by the same plaintiff against the same defendant, but, also, given the proper nexus, of joinder of claims distinct in point of plaintiffs or defendants or both. That nexus, resulting from the terms of the amended Rule 1, consists in (a) the common origin of the causes of action as arising out of or being in respect of the same transaction or series of transactions and (b) the potential presence of a question of law or of fact common to all. The wide range which the joinder may take under this principle is impressively illustrated by the decided cases.<sup>72</sup>

The particular latitude of joinder thus conceded by the English Rules has had its influence in America. In 1912, New Jersey, which still maintains the separate administration of law and equity, adopted, for common-law causes, provisions based upon Rules 1 and 4 of the English Order XVI. And, for actions in general, a similar step was taken by New York in the Civil Practice Act of 1920 as well as by California in 1927.<sup>73</sup> But in all three jurisdictions (though for New York the case became otherwise in 1935) operation of the principle has been variously narrowed by the presence of other regulatory elements.<sup>74</sup> In the Illinois Civil Practice Act of 1933,<sup>74</sup> however, there is such adaptation of the English provisions as bids fair to yield an amplitude of joinder not inferior to that of the transatlantic system.

Unquestionably it is essential to a well-ordered procedure that there should be no such combined disposition of separate causes of action as will work confusion or prejudice, but it is equally essential to avoid a plurality of suits where one will serve. Reconciliation of the two aims is not to be found in detailed rules definitively regulating the constitution of the suit, such as appeared in the New York Code and are still maintained by most of its progeny, but in according to plaintiffs a wide liberty of joinder and to the court discretionary powers to separate the issues for

trial. Some check upon the initial union there should be, and, in the bipartite nexus prescribed by the English Rules, this check seems satisfactorily afforded; certain it is, at least, that no closer relation should be here demanded.<sup>75</sup>

### 3. *The Admission of Counter-demands*

Except for certain limited rights of the defendant in respect of recoupment, developed by judicial doctrine, and in respect of the setoff of mutual debts, introduced by statute at a late period of its history, the common-law system gave no place to the counter-demand. In equity, on the other hand, the cross-bill was a recognized institution from an early day, its admissibility being restricted only by the rule that the case which it presented must be germane to that of the original bill. In view of the obvious desirability of adjudicating, so far as practicable, reciprocal claims in a single suit, repair of the common-law deficiency in this respect and the attainment of a uniformly applicable rule has been one of the important activities of the reform legislation. Not in its original form but as amended in 1852, the New York Code, for the prosecution of cross-demands, admitted what was given the new name of "counterclaim."<sup>76</sup> This, except where the cross-demand was based upon contract and interposed in an action upon contract, fell under the requirement that the cross-demand be one "arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." For the case of contract demand against contract demand no relationship was required.<sup>77</sup> The rules thus fixed have been followed at least in substance by a majority of the American codes.<sup>78</sup> Note, however, should be taken of the Iowa provision, originating in the Code of 1851,<sup>79</sup> and of the Arkansas statute of 1917,<sup>80</sup> which admit as a counter-demand any cause of action in favor of the defendant and against the plaintiff.<sup>81</sup> To the

same effect is the Illinois Civil Practice Act of 1933, with provision expressly made for separate trial of the counterclaim if convenience should so require.<sup>82</sup>

In England the old rules on the present subject remained substantially unaffected until the Judicature Act of 1873, which explicitly empowered the court to grant the defendant any relief against the plaintiff which it might have granted in a separate suit.<sup>83</sup> For the cross-demand thus made generally admissible, at least where it did not amount to a technical setoff, the statutory rules of 1873<sup>84</sup> adopted the American code term "counterclaim." This term has been carried forward into the existing practice under the Rules of 1883,<sup>85</sup> with distinction continuing to be made, as in a number of American jurisdictions,<sup>86</sup> between setoff and counterclaim.<sup>87</sup> As a result of the statute and Rules any cross-demand is now available by way of one or the other. The only limitation upon the counterclaim is the power of the court to exclude it, if its presence would interfere with the proper disposition of the plaintiff's demand. Hence,

"If the defendant has any valid cause of action, legal or equitable, against the plaintiff, there is no necessity for him now to bring a cross-action, unless his counterclaim be of such a nature that it cannot be conveniently tried by the same tribunal or at the same time as the plaintiff's claim."<sup>88</sup>

As in the case of joinder of causes of action, the latitude allowed by the English Rules and by a few of our own jurisdictions seems much more in consonance with a sound procedural polity than the close regulation characteristic of most of the American codes. Some proceedings will always be kept outside the ordinary rules in the one regard and the other as are, *e. g.*, matrimonial causes in England; but for causes in general, any initial restriction upon the admissibility of counter-demands may well be dispensed with,

given, as under the English system, the power of the court to exclude on the ground of inconvenience.<sup>89</sup> And indications are that such will be the general direction of future legislation in America.<sup>90</sup>

#### 4. *Pleading*

Object of pleading reform in England and America has been the achievement of a system emancipated, on the one hand, from the artificialities of the common law and, on the other, from the prolixity of chancery. The Hilary Rules of 1834 sought improvement of the common-law system by a depuration of its basis, but this, in the main, led only to enhanced difficulty in its workings. And while certain fragmentary advances were made by the earlier legislation in this country, and more decided progress was effected by the English Common Law Procedure Act of 1852 and the Chancery Practice Amendment Act of the same year, it is to the New York Code of 1848, for America, and the Rules under the Judicature Acts of 1873 and 1875, for England, that we must look as establishing the prevailing types of present-day pleading.

Under the American code system, the plaintiff's cause of action and demand for relief are stated in the pleading known generally as the "complaint" and in some jurisdictions as the "petition." Provision is made for a "demurrer," but this is limited to attack upon faults of substance particularly designated in the statute. Factual defenses are stated in an "answer." If the answer contains new matter, a "reply" is called for by most of the codes; in others the interposition of a reply depends upon leave of court; and in a few the pleadings stop with the answer. As a rule, any permissible counterclaim is stated in the answer, in which case a "reply to counterclaim" is usually in order. Defenses to the jurisdiction or in abatement, not available on motion or demurrer, are generally to be combined in the single answer with defenses on the merits,

but in a few jurisdictions their presentation is either required or permitted to be by way of preliminary answer.<sup>92</sup>

In England, the plaintiff sets forth his cause of action and claim for relief in a "statement of claim."<sup>93</sup> The defendant, on his part, interposes a "defense" or "counterclaim" or "defense and counterclaim" as the case may be. The succeeding step, if in order, is a "reply." Originally, under the Rules, this might be delivered without leave of court; later, in general, leave was required; and now, since 1933, the requirement is again omitted.<sup>94</sup> The reply, however, does not necessarily close the pleadings; it is open to the parties by leave of court to plead further, but occasion for so doing seldom arises. In 1883 the demurrer ceased to obtain; instead, the point of law is raised in the answering pleading. But where the legal insufficiency of the statement of claim or other pleading is so "plain and obvious" as to admit of no hesitation in recognizing it, a motion to strike out the pleading will be entertained.<sup>94</sup> Again, it is expressly provided that "no plea or defense shall be pleaded in abatement." Accordingly, such objections as were formerly the subject of dilatory pleas are now advanced by motion or by what is in effect a motion, though this may take the form of a summons to set aside service, to strike out parties, to stay proceedings, and the like.<sup>95</sup>

The two systems concur in exacting directness and brevity of allegation. By the usual American code provision the facts are to be stated "in ordinary and concise language without repetition"; by the English Rules, "every pleading shall contain, and contain only, a statement in a summary form of the facts on which the party pleading relies for his claim or defense."<sup>96</sup> They concur also in requiring the allegation of facts as distinguished from evidence and as distinguished from legal conclusions. Under the English Rules, with the permission to make affirmative allegations in the alternative, the use of the old method of plural counts for the

variant statement of the same substantive cause of action has completely disappeared; to a considerable extent, however, it lingers under the American codes. Here alternative allegation in this regard is far from being everywhere admitted to recognized standing.<sup>97</sup> So far as concerns the interaction of the pleadings, both systems follow the Germanic principle of the common law that whatever is not denied stands admitted. Thus both accept generally the common-law rule prescribing advance by way of traverse or by way of confession and avoidance, but in neither is there any sharp application of the rule, or resultingly, any insistence upon the definitive production, by the pleadings themselves, of literally formulated issues such as characterized the common-law system. The issues are there, but except in simple cases, their exact formulation, just as in the old chancery pleading, usually demands some interpretative activity on the part of the court.

For the purpose of ensuring good faith in the allegations, most of the codes have had resort to sworn pleadings; in some the requirement is a general one, in others—and this is the more usual rule—it is applied as a measure of party election: if either chooses to verify his own pleading then each subsequent pleading must be verified.<sup>98</sup> No requirement of the kind obtains in England; there, however, a check upon unfounded denial exists in the power of the court to compel payment by the offending party of the extra costs thus occasioned.<sup>99</sup> The American rule is of doubtful efficacy. For one thing, it tends to reduce the oath to a mere matter of convention and to favor the unscrupulous litigant at the expense of his conscientious opponent; furthermore, it offers an unnecessary obstacle to the presentation of inconsistent defenses, for which, by the consensus of enlightened opinion, opportunity should always be afforded. The English rule, on its part, is hard to operate, since its application involves in each case a particular inquiry into the matter of the extra expense arising from

the denial. But its mere presence has a salutary influence and, on the whole, it is much to be preferred to the other.

The fact has often been emphasized that the judges upon whom devolved the early administration of the New York Code were generally unsympathetic to its innovations and construed its provisions so narrowly as to prevent it from fully accomplishing the objects at which it was aimed. Illustrative of this unresponsive temper is the story related of the judge in a New York rural county, before whom, soon after the taking effect of the code, there came on for hearing a demurrer to a complaint, based on the objection that the plaintiff had failed to state a cause of action. The question turned on the meaning of the complaint's allegations. At that time the relative code provision, after requiring the facts to be stated concisely, contained the additional words: "and in such a manner as to enable a person of common understanding to know what is intended."<sup>100</sup> After listening to counsel and carefully reading the complaint, the judge handed it to his bailiff. "John," he commanded, "read over this complaint!" The bailiff silently read the pleading. "John," pursued the judge, "do you understand it?" "Yes, your Honor," replied the bailiff. "Very well," said the judge, "I don't understand it, but John does. The demurrer will be overruled." Certain it is that the code procedure entered upon its career in an atmosphere of unfriendliness, and the result was a crystallization of pleading doctrine that not only perpetuated certain of the old evils, but also developed technical difficulties unknown to the former regime. And while a later generation of judges, not thus biased by their training, has done much by way of correction, the system is still marked to a certain extent by the imprint of its early vicissitudes.

Detail we must forego, but it is safe to say that, although the statutes themselves are in some degree to blame, the standard set by these inauspicious beginnings largely explains why the Ameri-

can codes have not succeeded as well as the English Rules in reducing pleading to that purely ancillary position which it ought to occupy in the procedural scheme. There is commonly too strong an insistence upon exactness of statement in the allegation of cause of action and defense and, as before suggested, too rigid an application of the rule against variance between allegation and proof. The test of prejudice worked to the opponent of the party at fault is too apt to be overridden by considerations of the regularity of the record. Amendments, to be sure, are liberally allowed, but save in a few jurisdictions, the power to amend the pleadings stops with the trial court.<sup>101</sup> Where this is the case it is still possible for a judgment to be reversed by an appellate court because of a fault in the pleadings alone, without regard to the evidence or to the question of prejudice *vel non* to the opposite party. The English system, in contrast, has virtually attained the position that a fault in pleading, however substantial, will not be permitted to affect the result if it has produced no actual injury. This is accomplished in part by the power of amending available at all stages of the proceeding, but in greater degree by the difference in judicial attitude of which in an earlier place we have had occasion to speak. In comparison with the American event, the welcome at once extended by the English bench to the new system was as sunlight to shadow, and old prepossessions were not allowed to stand in the way of its successful functioning. Hence, if a party's claim or defense is supported by the evidence, he has little to fear from slips in his pleadings, for in practical effect everything depends on the case made at the trial.<sup>102</sup> It may be a question whether this does not go too far in a direction opposite to the traditional one: certainly criticisms of the looseness of modern English pleading from time to time come to expression.<sup>103</sup> But for the present at least, this looseness is endured in the interests of substantial justice.



A characteristic by-product of the more shackled administration of the pleadings under the American codes results from the circumstance that precisely the same set of facts may give rise to different theories of recovery. Thus the statement of the facts *qua* facts or even in conjunction with the prayer for relief, should the court be willing to look at the latter for the purpose, will not always identify the theory on which the plaintiff is seeking to proceed. And yet identification may become necessary for various reasons, as, for example, in determining, in respect of the mode of trial, whether the action is legal or equitable; in determining, in respect of the right to body execution, whether it is in tort or in contract; in determining, in respect of the measure of damages, which one of several principles, appurtenant at common law to different forms of action, is here to find application. In such cases, the courts, groping for means of identification, are disposed to attach importance to the *manner* in which the facts are stated, with reference to its greater or less approximation to the modes of allegation of the old system. From this has arisen the so-called "theory of the case" doctrine which confines the plaintiff to the identifiable theory for such purposes as those mentioned. And while, in the absence of particular exigencies of the kind, it is usually considered that the plaintiff is entitled to recover on any theory to which the facts alleged, as supported by proof, give rise, some jurisdictions there are which confine him to the identifiable theory for all purposes of the case.<sup>104</sup> In effect, the jurisdictions last mentioned go on the ground that the defendant, as a general matter of pleading, is entitled to notice of the legal theory, as well as of the facts, upon which recovery is sought. And, however opposed to the not too carefully developed intent of the codes, this view is not without a certain justification, for it is often quite as important that the defendant be apprised of the one thing as of the other, as, indeed, he generally was under the displaced

systems of pleading. In France, Italy, and Spain the pleadings are required to state the legal as well as the factual basis of proceeding.<sup>105</sup> In Scotland the same purpose is accomplished by the pleas in law of pursuer and defender.<sup>106</sup> It would seem, therefore, that a useful reform would be here accomplished by requiring the pleader, after his statement of facts, to note summarily the legal theory or theories upon which he intends to rely, on the analogy of the Scottish plea in law, the note to be amendable in substantially the same way as the statement of facts.<sup>107</sup> The English Rules no more than the American codes take the present matter into account, but the easier management of the pleadings under these Rules has prevented the development of any technical doctrine on the subject.

Commonly in the American jurisdictions the pleadings are required to state all the essential elements of cause of action or defense. The same is true under the English Rules in principle,<sup>108</sup> though hardly in practical effect, since the requirement is not applied with anything like the American strictness. Statement of these elements sometimes squares with the idea of notice to the adversary; sometimes, however, it transcends that idea, as, for example, in the plaintiff's allegation of *scienter* in the traditional case of the biting dog. Accordingly, claim to recognition has been advanced on behalf of a new principle, known as that of "notice pleading," under which the pleader need state only such facts as are requisite to furnish reasonable notice of the demand or defense.<sup>109</sup> An application of this principle, adopted by rule of the Municipal Court of Chicago in 1909, was in 1915 followed in Michigan with respect to the declaration in common-law causes.<sup>110</sup> And incorporated in the Illinois Civil Practice Act of 1933 is the general provision that "no pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense

which he is called upon to meet,"<sup>121</sup> but here, to speak only of its relation to the complaint, the principle seems to be neutralized by other provisions requiring the statement of a cause of action.<sup>122</sup>

As in other procedural fields, so in that of pleading, the later American legislation exhibits here and there the influence of the English Rules. The most conspicuous and certainly the least useful of its manifestations is the abolition of the demurrer. This has occurred by the Federal Equity Rules of 1912 and in a number of the state systems, including those of New York and Illinois.<sup>123</sup> The English Rules, in discarding the demurrer, require in general the point of law to be taken in the answering pleading. Only when the questioned pleading discloses "no reasonable cause of action or answer" or is frivolous or vexatious, thus only when its legal insufficiency is a glaring one, is a motion to strike out in order.<sup>124</sup> The motion is, therefore, a very different thing, in point of scope, from the old weapon. But the American enactments in the present regard, obedient to the idea that in the interest of economy of time and expense a preliminary test of the legal sufficiency should be always in order, have proceeded otherwise. Most of them permit the objections to be taken in the answering pleading, but all concur in extending the absolute right to raise all objections of the kind, without distinction, by way usually of motion.<sup>125</sup> Hence, apart from the matter of objection in the answering pleading, the motion is made an outright substitute for demurrer: the change is but a change in name. The prevailing liberality of amendment has everywhere stripped the term "demurrer" of any sinister significance that it may once have had, and, since a motion to strike out, to dismiss, for judgment, or the like may proceed on many grounds other than that of the legal insufficiency of the opponent's pleading, the dropping of the term is detrimental to exactness of procedural terminology and, in consequence, to clarity of procedural conception.<sup>126</sup>

As a final word on the present topic, mention should be made of a recent innovation originating in the Rules adopted under the New York Civil Practice Act of 1920.<sup>117</sup> This permits the defendant to advance by motion to dismiss, supported by affidavit, certain grounds of defense ordinarily admitting of speedy disposition, instead of setting them forth by answer in the usual way. Thus embraced (in addition to jurisdictional objections, formerly the subject to a certain extent of motion, even though not apparent on the face of the complaint) are the defenses of lack of procedural capacity on the part of the plaintiff, pendency of another action, former judgment, statute of limitations, release, statute of frauds, and nonaccrual of the cause of action by reason of the defendant's infancy or other disability. Provision is made for forming an issue of fact on the affidavit and for preservation of the right of jury trial where that obtains. This departure has been followed in the Illinois Civil Practice Act of 1933 with certain variations, particularly as to the mode of determining the motion.<sup>118</sup> The measure, by virtue of the short cut to decision which it offers,<sup>119</sup> is one calculated, under proper administration, to contribute markedly to abridgment of litigation in cases coming within its purview.

### 5. *Pre-trial Disclosure*

One of the few blemishes that Blackstone permitted himself to impute to the common-law system was its lack of any means of discovery.<sup>120</sup> Elicitation of facts from the adversary could be had only in equity and, if required in the prosecution or defense of a common-law action, entailed a separate equity proceeding for the purpose. And the equity mechanism, due in part to its merger with the pleadings, in part to perpetuation of the formal proof rule that demanded the testimony of two witnesses or the equivalent to overcome the statements of the sworn answer, was without a

full quota of effectiveness. Concession to the courts of the power to allow discovery in common-law causes began in the United States. Before the appearance of the New York Code of 1848 various states had adopted measures to this end,<sup>121</sup> utilizing as instrumentality either written interrogatories directed by one party to the other or an equitable petition or motion for discovery presented as a step in the common-law action.<sup>122</sup> But with that code came signal contribution to the present field. A New York act of 1847 had gone to the extent of permitting the parties, in any civil proceeding, to examine each other as witnesses at the trial.<sup>123</sup> The code laid hold of the idea of oral examination as a complete substitute for the traditional chancery method and provided for such an examination of one party by the other either before or at the trial.<sup>124</sup> Accordingly, the oral examination in advance of trial, usually by means of deposition taken in accordance with ordinary deposition practice or pursuant to order of court, has come to be the prevailing method of fact-discovery in most of the American jurisdictions. In many, however, the written interrogatory, sometimes annexed to the pleadings, sometimes not, is employed instead. In particular, the detached written interrogatory is the device used under the Federal Equity Rules of 1912. And in some jurisdictions the law offers to the litigant a choice of methods, while a few, for discovery before trial, have not progressed beyond the old chancery system, albeit in modified form.<sup>125</sup>

For England, apart from the provision, contained in Lord Denman's Act of 1843,<sup>126</sup> making any defendant examinable as a witness on behalf of the plaintiff or any codefendant, initiation of reform dates from 1852. The Chancery Practice Amendment Act<sup>127</sup> of that year effected a decided improvement of the old system by separating the interrogatories from the bill (though not the answers to the interrogatories from the answer to the bill) and by according to the defendant—who hitherto could have had no discovery from the plaintiff except by means of a cross-bill—

the right directly to address interrogatories to the plaintiff. In 1854, by the Common Law Procedure Act of that year,<sup>128</sup> discovery was introduced in the common-law system, the method provided being that of written interrogatories. Under the Judicature Acts of 1873 and 1875 the same method—that of written interrogatories and answers wholly dissevered from the pleadings—was adopted for the unified procedure and remains the method of the present day.<sup>129</sup>

The conviction is more and more coming to prevail that the value of the oral examination as a means of discovery far surpasses that of the written interrogatory.<sup>130</sup> In the opportunity for extended deliberation in private afforded by the latter lies too strong a possibility of concealment or evasion. The contribution of the New York Code on the present subject will always rank as one of the foremost events of Anglo-American procedural history. Its significance is such as to cause one the more to lament the patina of technicality with which the measure has since been overlaid in the jurisdiction of its origin.<sup>131</sup>

It is to be noted, however, that the importance of fact-discovery before trial has been distinctly lessened by the mid-century revolution in the law of evidence by which the parties are made competent witnesses for and against each other in all civil proceedings. Since, under this rule, now of universal prevalence in the Anglo-American jurisdictions, either party may examine the other as a witness at the trial, it is apparent that the need for a distinct method of fact-discovery, vital when the opposite party could not be called as a witness, has in a considerable degree disappeared. This explains why, in the American jurisdictions preserving the old chancery mechanism, its application, after the change in the rule of evidence, was largely discontinued, and accounts for the fact that a small minority of the states, as well as the federal jurisdiction, are still without any special method of fact-discovery in common-law causes.

Concerning discovery and inspection of documents, the common-law system was almost as negative as in the matter of discovery of facts. As to sealed instruments upon which the claim or defense directly rested, there was a right to inspect, for pleading purposes, through the institution of *profert* and *oyer*. Under certain circumstances permission was sometimes given preliminarily to inspect an unsealed writing upon which the action was founded. But as to all other documents in the possession of the opposite party, however essential, there was no right at all to see them in advance of trial, and, with certain narrow exceptions, no right to require their production at the trial.<sup>132</sup> Resort to equity by a separate proceeding in aid of the common-law action or defense was thus often required. But this condition, also, has been largely corrected. The right to require documentary production at the trial is now generally an adequate one, while in a large majority of the Anglo-American jurisdictions<sup>133</sup> provisions exist for discovery and inspection, before trial, of material documents in all civil actions. Notable, in the latter regard, is the method prescribed by the English Rules by which, as its central feature, each party may be required, upon order of court, to list all documents and papers relating to the cause, that are in his possession or under his power, distinguishing those which he objects to producing. Accordingly, the items of the one sort are open to inspection of the opposite party forthwith, while the items of the other sort become similarly available to him if and when the objections noted are disallowed.<sup>134</sup> This method in essence has found entrance into the Rules under the Illinois Civil Practice Act of 1933.<sup>135</sup>

#### 6. *The Verdict in Jury Cases*

When we turn to trial by jury, we must note a discordant trait in the general picture of progress. For the procedure in most of the American jurisdictions, so far as concerns the relation of the court

to the jury in the attainment and control of the verdict, exhibits changes from the common law which have not been for the better. As a result of the early distrust of the judicial authority, intensified by the wave of democratization which reached its height about the middle of the nineteenth century, the common-law power of the judge to charge the jury orally upon both the law and the evidence has been suffered to obtain only in the federal courts and in a small minority of the state jurisdictions.<sup>136</sup> Elsewhere the judge is restrained from commenting on the evidence. In certain of the states he may summarize the evidence for the benefit of the jury, but without expressing any opinion as to its effect. More usually, however, he is not permitted to go beyond charging upon the law, and in a majority of the jurisdictions his instructions must be given in writing, either as a matter of course or upon request of one of the parties. The evils of the written instruction have been often pointed out. Usually consisting of a series of separate hypotheses, elaborated in winding sentences and studded with technical expressions, it is seldom fully comprehensible to the ordinary juror, even if he is disposed to apply his mind to its confusing contents. The consequence is not only to deprive the jury of that direct and plain-spoken guidance which is their due, but also to develop a new species of special pleading (for so it has been aptly called) fertile in engendering error, to which the appellate courts apply none too elastic a yardstick. As for the prohibition of judicial comment on the evidence, it is justly said that this "has done more than any other one thing to impair the general efficiency of jury trial as an instrument of justice."<sup>137</sup> Fortunately we may look forward to a day of regeneration; signs are not lacking of an active movement toward reinstating the present phase of jury trial upon its common-law basis.<sup>138</sup>

The books of the common law teach that verdicts were of two



sorts, general and special. The general verdict was that which passed upon the several issues produced by the pleadings; the special verdict, originating as a means of averting the risk of the barbarous attain, found the facts *in specie*, as established by the evidence, leaving the conclusion of law to the court. This learning was accepted implicitly in the American jurisdictions. But the English courts, long before the opening of the nineteenth century, had been employing various devices for the purpose of keeping a proper rein upon the verdict and preventing it from going contrary to law. Thus, there was the practice of entering the verdict found for the plaintiff, with leave reserved to the defendant to move for the entry of a nonsuit or a verdict in his favor; of entering the verdict found for the defendant with leave to the plaintiff to move for an opposite verdict; of entering a nonsuit with leave reserved to the plaintiff to move for a verdict.<sup>139</sup> The reservation in such cases apparently depended upon the consent of counsel, and where it contemplated a verdict other than the one found, it proceeded also on the theory of at least an implied consent by the jury.<sup>140</sup> There was also the practice of taking the verdict subject to a special case stated by agreement of counsel.<sup>141</sup> And, beginning, perhaps, about the opening of the century, the reports disclose a practice which does not seem to have had the attention of the books—the practice, that is to say, of putting special questions to the jury and directing a general verdict in accordance with the court's view of the legal effect of the answers.<sup>142</sup> But, chiefly due to the persisting fear of the judge exceeding his province, devices of the kind had scant attraction for the formative era in America. To be noted, however, is the recognition in Pennsylvania, dating from a statute of 1825, of a limited power of making the verdict subject to a reserved question.<sup>143</sup> Mention should also be made of the provision incorporated in the New York code in 1852, authorizing the attainment of a verdict subject to the opin-

ion of the court<sup>144</sup>—a provision which has had some following elsewhere. Both these statutes in a circumscribed measure permitted the court to enter, in a proper case, what is now spoken of as a judgment *non obstante veredicto*, dictated not, as in the case of the common-law judgment of that name, by the state of the pleadings but by the state of the evidence. Further progression in the same direction has come in later years. Thus, the Pennsylvania rule in its subsequent development<sup>145</sup> yielded the practice allowable under an act of 1905, whereby, after an erroneous refusal to direct a verdict, the trial court after verdict or the appellate court on review might rectify the error by giving judgment for the party in whose favor it would have gone had the verdict been directed, instead of by awarding a new trial. Meantime, Minnesota, by a statute of 1895, had anticipated this very result. Similar legislation has since found place in other states.<sup>146</sup> So far as concerns the state jurisdictions, the validity of this practice has been accepted, but in the well-known case of *Slocum v. New York Life Insurance Co.*,<sup>147</sup> there being in question the Pennsylvania statute as applied in the federal court, the Supreme Court of the United States held that the entry of judgment pursuant to the statute, where the trial court had declined to direct a verdict, was violative of the right of jury trial under the Seventh Amendment. In a recent case,<sup>148</sup> however, involving the New York practice in this regard the court, expressly qualifying parts of its previous opinion, has taken the view that where there has been a reservation of decision on the motion to direct instead of its outright denial no such violation occurs. This decision encourages the hope that the unfortunate result in the *Slocum* case will one day be reconsidered *in toto*.

The special verdict as at common law, though nominally retained in a number of the American jurisdictions, has generally fallen into disuse. Provision is made in various states for what is

known as a special verdict, which at least in practice is usually composed of answers to questions submitted,<sup>149</sup> but, except as presently to be noted, this retains, as a rule, the infirmity of the common-law institution in the requirement that, apart from matters admitted in the pleadings, it find every element of fact, disputed or undisputed, necessary to support the judgment. From an early day, however, there appeared the distinctive practice, established in most of the New England states by judicial usage and elsewhere resting on statute,<sup>150</sup> by which the jury is required to answer special interrogatories in connection with its return of a general verdict. The special findings thus attained control the general verdict in such wise that, if a material inconsistency is present, they afford the basis for a judgment contrary to that verdict. This method finds employment in the greater number of the states.<sup>151</sup> But much more satisfactory in its results than the general verdict coupled with special findings is a form of verdict of statutory creation which obtains in Wisconsin and Texas, known in the former as a "special verdict," in the latter as a verdict on "special issues." Some differences exist between the two, but under the relative mode of proceeding in either the court may of its own motion, and must at the instance of either party, submit specific questions for answer by the jury in lieu of a general verdict. The principal difficulty arising in the case of the common-law special verdict is here obviated by the rule that if the party fails to request submission on a particular matter he is taken to have waived jury trial as to the matter thus omitted. Accordingly, when the court renders judgment on the answers of the jury, any such omitted matter is considered to have been decided by the court in harmony with the judgment rendered.<sup>152</sup> By following the Wisconsin model this practice also finds place in Michigan.<sup>153</sup>

At common law, as we know, the general verdict represented the jury's pronouncement on the formulated issue or issues. If,

for example, to an action of debt on a bond the defendant had pleaded *non est factum*, and the jury decided in favor of the plaintiff, the verdict when spoken in court may well have been: "We find for the plaintiff and assess his damages at such and such a sum," but, when entered of record, it appears as a specific finding on the issue, *viz.*, "the jurors . . . say upon their oath that the within mentioned writing obligatory is the deed of the within named C. D. as the within written A. B. has within declared against him," followed by the requisite assessment of damages.<sup>154</sup> In case of a plurality of issues the same principle self-evidently applied. Thus the general verdict, in addition to its fixation of the amount of recovery if the event so required, was always in legal effect a finding or series of findings meeting the issue or series of issues developed by the pleadings, in the precise terms of those issues. Now, though in the reformed pleading the issues are seldom formulated in the concrete fashion of the common law, they are necessarily extractable from the pleadings and are or should be distinctly stated by the court to the jury. If, then, the jury is asked to return, instead of a verdict in terms of a general finding for one party or the other, a verdict consisting of categorical affirmative or negative answers to specific questions framed in terms of the issues as drawn by the court from the pleadings, along with an answer to a question on the amount of recovery should the preceding answers so require, there can be no doubt that we have here a general verdict fully corresponding to that of the common law. This idea has been laid hold of in North Carolina, where, under a provision regulating the drafting of the issues "arising upon the pleadings," it has been put into successful application as the usual method of taking a verdict, for more than half a century.<sup>155</sup> The method is one that ought to be open everywhere, and without statutory aid, for it entails the utilization of common-law principles that have nowhere been displaced.

In the present regard, the English procedure of today is much freer from apparatus than is commonly the American. The verdict may be a general one in terms of a general finding for one party or the other. But, as often as not, the judgment is based, instead, upon the jury's answers to specific questions put by the judge. These are not drafted by counsel but are the judge's own. The circumstance that there may have been some matter not determined by admission in the pleadings or by the jury's answers cannot affect the judgment, so long as the matter has not been actually controverted. An omission of the kind, with us, would be harmless under such a statutory practice as that obtaining in Wisconsin and Texas. Elsewhere, for the most part, there would be applied to the case the traditional principles of the common-law special verdict, and the omission, if concerning a material though wholly undisputed matter, would be fatal to the judgment.<sup>156</sup> Certain provisions of the Rules<sup>157</sup> contribute to the English result, but this seems mainly to have been brought about by the general attitude of bench and bar since the Judicature Acts in looking to the substance rather than to the form. For America, however, the more trammelled conditions of jury trial make hopes for the future dependent upon further acceptance of the principle which we have seen turned to account in the statutory practice last mentioned.

### 7. *The Judgment*

Under the old regime there existed an inveterate contrast between the judgment at law and the decree in equity. The latter was flexible, adjusting itself to the multiform contingencies of decision in the particular case; the former, reflecting the limited manner of relief afforded by the common-law courts, was always "simple and absolute,"<sup>158</sup> always in stereotyped form of affirmative or negative adjudication. Again, equity was entirely free to

enter decretal orders from time to time in the progress of the suit, making, if need be, final disposition of part of the cause while retaining the residue for further consideration. The common law, on the other hand, although settling various interim matters by interlocutory judgment, knew but a single final judgment, regardless of the number of parties or causes of action involved, and this unitary judgment must go in favor of all the plaintiffs or (tort actions apart) in favor, with slight exception, of all the defendants. Moreover, unlike equity, the common law offered no means, within the suit, of determining any controversy arising between the defendants. This situation is no longer typical. Change in the direction of assimilating the two types of judgment has necessarily accompanied the advent of concurrent administration of legal and equitable rules; change, too, has come in the purely common-law judgment, the better to adapt it to the ends of justice. By the original New York Code there was introduced, for causes in general, the rule hitherto obtaining in chancery that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side as between themselves."<sup>159</sup> This departure, which has been followed in most of the American codes, is usually supplemented by the further provision issuing from a New York amendment of 1849,<sup>160</sup> which expressly authorizes the court in case of a plurality of defendants to "render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper." Such provisions naturally operate in correlation with the regulation of joinder of causes of action and of parties in the particular jurisdiction. So, too, their application is subject to the prevailing substantive-law rules as to joint rights and several rights on the one side, and joint obligations, joint and several obligations, and several obliga-

tions on the other—a tangled field into which a measure of order has been introduced by other statutory provisions governing particular aspects of the ensuing problems. Authority to enter a fractional judgment is variously conceded in cases beyond that, just noted, of a plurality of defendants. In particular, provisions appear in many jurisdictions, under which judgment may be given for an admitted or uncontested part of the claim without prejudice to a continued prosecution of the suit in respect of the residue. In general, therefore, the trend in America has been toward imparting to the common-law judgment, so far as permitted by the nature of the rights involved, that malleability which has always been characteristic of the equity decree.

This, too, has been the direction in England, and the result attained differs but little from that in the most advanced of the American jurisdictions. It is provided for the case of plurality of parties that, without amendment, judgment may be given “for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to,” or “against any such one or more of the defendants as may be found to be liable, according to their respective liabilities.”<sup>161</sup> A series of provisions exists permitting the rendition of judgment for an admitted or undefended part of a claim or, in case of default or failure to disclose a right to defend, against one or more of a larger number of defendants, the right being reserved to the plaintiff to prosecute his action to further judgment for the residue of his claim or against the remaining defendants.<sup>162</sup> In the case of counterclaims, moreover, the court often exercises the power to render separate judgments on the original and cross-demands.<sup>163</sup> A controversy between codefendants, as one in respect of contribution or indemnity, may find adjudication in the principal judgment<sup>164</sup> but would seem regularly to be the subject of a separate judgment.<sup>165</sup> In general, however, the wider latitude of joinder of

causes of actions and of parties than is usually allowed in the American jurisdictions permits the single judgment to have a correspondingly wider scope. But, as with us, the plasticity of the judgment is necessarily held in check by considerations relating to the severability of the demand. And, to a greater extent than is commonly true in America, the technical common-law rule as to joint liability here preserves an influence. For, in the case of a joint contractual obligation, under some circumstances, and in the case of a joint tort liability generally, the taking of judgment against one of a plurality of defendants is still held to release the others on the traditional theory of merger.<sup>166</sup>

At common law the courts were accustomed to deal summarily with certain cases of so-called "sham pleas," setting such a plea aside on affidavit of its untruth and awarding judgment peremptorily to the plaintiff, as for want of a plea.<sup>167</sup> With its root in this usage there originated in America the practice of requiring the defendant, usually in actions on contract and after affidavit of claim on the part of the plaintiff, to interpose with his plea an affidavit of merits as a condition of his right to defend. This practice—one early instance of which was owed to an agreement of the Philadelphia bar in 1795<sup>168</sup> and another to a New York rule of court adopted in 1808<sup>169</sup>—found acceptance in various jurisdictions and, since in the absence of the affidavit the plaintiff was entitled to judgment forthwith, proved a useful means of cutting off groundless defenses. A factor operating against its general acceptance, however, was the appearance of the code provision for verification of the pleadings. In England, by a statute of 1855,<sup>170</sup> a measure similar to the American one was applied to the narrow field of actions upon bills of exchange and promissory notes—but with improvements, including the necessity imposed upon the defendant of obtaining leave to defend, which might be subjected to terms. It was left, however, to the English Rules under the



Judicature Acts, in their provisions concerning summary judgment, to carry the institution to a maximum of advantage in foreclosing unfounded steps of defense. Under the practice thus established, the plaintiff who has caused his writ to carry a special indorsement<sup>172</sup> or to be accompanied by a statement of claim may submit an affidavit verifying his cause of action and stating his belief that there is no defense to the action except as to the amount of damages claimed, if any, and apply for judgment. An order for judgment in appropriate form will follow unless the defendant is able to satisfy the court "that he has a good defense to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally."<sup>172</sup> The defendant may discharge this burden by affidavit or the court may allow him to be examined on oath.<sup>173</sup> Discretionary power exists to permit a reply affidavit from the plaintiff.<sup>174</sup> Decision of any triable issue appearing is not here in order:<sup>175</sup> that is, the province of the trial: but the defendant's showing must go particularly into the facts so that the court can determine whether or not the prescribed test has been met. Leave to defend may be granted with or without terms as the case may warrant.<sup>176</sup> This mode of proceeding, under recent amendments to the rules, is now applicable to all actions of a common-law nature, except those for defamation, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage, and actions where fraud is alleged by the plaintiff. In addition, it is available in actions to recover a liquidated sum due on a trust, as also, with some variation, in suits for specific performance.<sup>177</sup> The effectiveness of the English institution of summary judgment has not failed of appreciation in this country. Provisions distinctly reflecting its influence have been adopted in a number of jurisdictions, including New Jersey, New York, Connecticut, Michigan, and Illinois. But in none of the states named does the institution have such a wide province of

application as has of late been accorded it in England, though the Connecticut and New York provisions differently extend to certain cases not embraced in the English Rules.<sup>178</sup> In Wisconsin, however, is to be noted a further advance. Here a summary judgment provision of 1931, similarly reflecting the transatlantic influence, has recently been revised by Supreme Court rule so that, finding application in a category of cases very close to that of the New York practice, its benefit, within this category, is not confined to the side of the plaintiff: upon an analogous showing of lack of merits in the action, it permits summary judgment in favor of the defendant.<sup>179</sup>

A development finally to be noted is the declaratory judgment. Basically this represents an extension of the field of actions, involving, as it does, the definite recognition of a purely declaratory action, *i. e.*, one looking to a declaration of rights without the concomitant award of resultant relief, but in current usage the accent is placed upon the product of the action rather than upon the action itself. Of Roman-law lineage, but borrowed directly from the law of Scotland, this institution was domesticated in England by legislation beginning in 1850<sup>180</sup> and eventuating in a provision of the Rules of 1883 under which the court was empowered to "make binding declarations of right whether any consequential relief is or could be claimed, or not."<sup>181</sup> The authority so conferred, it is to be noted, was not without certain precedent in the older law, for the equitable jurisdiction, as in the construction of trust instruments, had long been disclosing fragmentary instances of what in substance was its exercise.<sup>182</sup> But anything like a general power of the kind had now, for the first time, come to be conceded. The provision referred to remains in force, as supplemented by rules adopted in 1893 and 1933<sup>183</sup> allowing application for the declaration in certain cases to be made by the expedited procedure of originating summons.

America at the outset was slow to grasp the significance of the remedial increment thus established, but, thanks especially to the writings of Professors Borchard and Sunderland, there has latterly ensued a reception of the institution comparable, in rapidity and extent, to that which, in the middle of the last century, attended the march of the New York Code of Procedure. From 1919 to 1934, according to Professor Borchard's treatise, the declaratory judgment had become naturalized in thirty-one states as well as in Hawaii, the Philippines, and Porto Rico, nineteen of these jurisdictions having taken for model the Uniform Declaratory Judgments Act proposed in 1922 by the National Conference of Commissioners on Uniform State Laws.<sup>184</sup> And, by an act of June 1934, Congress implanted it in the federal system.<sup>185</sup> Throughout the legislation in question the declaratory power is a general one, except for its restriction in Florida and Massachusetts to the construction of written instruments<sup>186</sup> and its inapplicability, under the federal statute, as amended in 1935, to questions of federal taxation. From this remarkable record of intensified progress it is fair to assume that the day is not far distant when the institution, with its "enormous and far-reaching possibilities in preventive relief—prevention not merely of threatened wrongs but prevention of uncertainty and misunderstanding in the assertion of rights,"<sup>187</sup> will have become an integral part of the remedial system in every American jurisdiction.

#### 8. *Additamenta*

Such are the more salient of the changes that have transformed the old regime into the new. But those noted have been accompanied by a myriad of others: no department of procedure has remained untouched. Thus the rules relating to initial process and its service have been variously recast: service by a private person instead of by the sheriff or other officer is sufficiently com-

mon in the American jurisdictions and is now standard in England; constructive service has become definitely regulated and, due especially to constitutional considerations governing the individual state in its relation to the citizens of sister states, has in America undergone a particular development with particular limitations; older methods of avoiding submission to the jurisdiction in challenging sufficiency of service have in general given way to the use of the qualified appearance, known usually in America as the special appearance and in England as the conditional appearance or appearance under protest. The procedure of judgment by default has been everywhere simplified, and the common-law assessment of damages by a sheriff's jury, under a writ of inquiry directed to that officer, has been laid aside, in almost all the American jurisdictions, in favor of assessment by the court or by a jury under the court's direction, though it remains a distinctly available mode of proceeding under the English Rules. The bill of particulars, which first appeared in the late eighteenth-century practice of English common-law courts, as a means of reducing the generality of the common counts in the actions of assumpsit and debt has been pursuing an ever widened career of usefulness, and in most jurisdictions today, under different externals<sup>288</sup> and varying regulations, particulars are freely grantable in every sort of action. Signally affected has been the law of parties to actions. Extensive changes in this field necessarily have resulted from the fact alone of the fusion of law and equity but have occurred in many other respects as regards the role of plaintiffs and defendants: something of this we have already seen in connection with the joinder of causes of action. The right of third parties to intervene in the cause for the protection of their interests, known neither to the common law nor (except perhaps in germ) to the classic equity practice, has come to be definitely recognized within varying limits. And the idea immanent in the

long obsolete voucher to warranty of the old real actions and its Germanic forerunners has been revived and generalized in a new guise under the third-party procedure of the English Rules, and to some extent in this country,<sup>189</sup> by provisions enabling the defendant to bring into the cause a third person liable over to him in respect of the plaintiff's claim and thus to obtain his eventual relief against the third person without the necessity of resorting to a separate action.

Nowhere does the traditional method of taking evidence in chancery, in its classic form, preserve a footing. Subject to the power of the court to direct reference to a master, referee, or similar officer, viva voce testimony in open court is now the rule for equitable as well as legal matters. Exceptionally, a few of the American states<sup>190</sup> that maintain the divided jurisdiction require testimony in chancery causes to come by way of deposition, but here the deposition is usually the product of oral examination and cross-examination before the delegated officer.

Nonexistent at common law, the right to waive trial by jury is now conceded in all quarters. In America there has developed on a slender common-law basis the generally obtaining practice, unknown in modern England, which permits the parties to examine the prospective jurors on their *voir dire* as a basis for challenge. That the practice has merits when properly restricted cannot be gainsaid, but too often the court is not permitted a sufficiently firm hand over its bounds to prevent it from unnecessarily protracting the trial. In a small number of the American jurisdictions the jury may consist of less than the common-law twelve, while in a considerably larger circle the old requirement of unanimity in the verdict has been replaced by that of a designated majority. Apart from the case of an issue under a dilatory plea and with slight exception for certain cases of severance in defenses, common-law trial by jury was a trial of the cause en bloc.

Union of legal and equitable issues has inevitably operated in modification of that feature. Independently of this, moreover, there is encountered in the modern law a wide variety of provisions for the separate trial, differently conditioned, of particular issues.

The procedure of execution has come in for its share of attention, and equitable aid in enforcement of money judgments has been facilitated by means provided for examination of the judgment debtor in the judgment-cause itself, as under the supplementary proceedings of the American codes and the analogous practice in England. As for appellate procedure the changes here have been legion, producing highly diversified systems in different jurisdictions. Notable in this province is the merger of the common-law writ of error and the chancery appeal, attendant upon the fused procedure in the United States; notable also the elision of the separate motion for new trial by the appeal to the Court of Appeal under the English Rules.

#### CONCLUSION

A Continental jurist of today, observing the civil procedure of the Anglo-American jurisdictions, would find the contrast to his own system decidedly less pronounced than that which was encountered by his predecessor of a century ago. For in the amalgamation of law and equity, the broadened opportunity for inclusion of a plurality of controversies in the same suit, the constantly expanding practice of dispensing with jury trial, the extension of pre-trial disclosure to every class of proceeding, the welcome accorded to the declaratory action, and, slow as the process has been in the United States, the lessening of emphasis upon allegation as such, the development has been wholly in the direction of the procedural ideas commonly obtaining on the Continent.<sup>291</sup> So, too, the tendency exhibited in latter-day enactment to repose a higher

measure of discretionary power in the court and to limit party control over both the content and progress of the cause is in keeping with the trend of modern Continental legislation as particularly exemplified in the Austrian Code of 1895.<sup>192</sup> But nowhere else does the directive authority<sup>193</sup> thus embraced come to such outstanding manifestation as in that flexible adjustment of the procedure to the cause afforded by the English practice of summons for directions, under which the court (usually through the master) determines for the individual case what interlocutory proceedings shall be had and, subject to the governing limitations, what shall be the mode of trial.

Scrutiny of the events of procedural reform in the period under survey makes it apparent that most of the important changes have had their inception in America, but that the same ideas which they involved have been applied in England, where usually (though not always, as witness the matter of fact-discovery) they have been carried to a higher degree of efficacy. No one has yet undertaken to ascertain with precision the limits of the influence which American pioneering has here projected across the Atlantic, but if and when such a study is made it is bound to reveal an indebtedness of significant volume. On the other hand, the influence which, in turn, the English reforms, especially of late years, have exercised upon the American is sufficiently plain and conspicuously acknowledged. In any event, recollection of the fact that we were first in the field should render us less disposed than we have been for some time past to depend upon English initiative.

While an intrinsic comparison of the English procedural mechanism of today with the best type of our own will, for the most part, result in favor of the former, it is less in the mechanism itself than in the extrinsic factors bearing upon its successful functioning that the English system exhibits its particular virtue. For one

thing, the mechanism has its setting in that unified judicial system represented by the Supreme Court of Judicature; to say nothing of its other merits, this tends immensely to simplify the processes of appeal. Again, administration of the mechanism is through the medium of a comparatively small, highly trained group of practising barristers, centralized in London, sympathetically coöperating with the court and setting a pattern for the conduct of causes in lesser jurisdictions; easy to see is the propitiousness of such an ambient for development of a concentration upon substance which frowns upon the purely formalistic. England, moreover, has to reckon with no such handicap as is presented by the system, so widely obtaining in America, of a popularly elected judiciary—a system which, as applied to the trial courts of metropolitan communities, is demonstrating in an ever increasing degree its impotence to furnish, except occasionally, judges of a high standard of learning and ability.

Thus in America as between the administrative circumjacentcies of the procedure and the procedural machinery itself, it is the former that call more loudly for melioration. And this call is gradually being heeded. The movement toward unification of judicial systems, to be sure, does not progress with any great rapidity, but its activity is unabated and the minor successes that it has achieved hold out strong encouragement for the future. Better methods of choosing judges than that of popular election are coming more and more into a renewal of favor: the recent constitutional amendment on this point in California introduces an experiment which will be worth watching. The steady advance in the standards of professional qualifications cannot but result in a bar more conscious of its true function, less inclined to the mere sterilities of procedural disputation. And to know that these same sterilities are more and more meeting judicial discountenance one need only compare, in almost any of the jurisdictions,



the reported decisions of today with those of a quarter of a century ago. By way of offset, moreover, to the English advantages is the reassuring circumstance that litigation in the United States is not calculated to impose upon the litigant any such financial burden as in England. For there, due in part to the double-branched legal profession, in part to the dictates of tradition, litigation in other than the inferior courts is highly expensive, so expensive at times as to amount virtually to a denial of justice.<sup>194</sup>

As to the procedure itself, it is apparent that much remains to be done before the less advanced of the American jurisdictions are brought abreast of those that stand in the foremost rank. But for the latter, as well, the need of further improvement is continually being disclosed. In England, too, this need is experienced. There, especially under the promptings of the London Chamber of Commerce, various changes have lately been effected and others are on the way.<sup>195</sup> As the history of procedure in the past has been the history of procedural reform, so it will always be in the future. The process of reform is an endless one, seeking as it does to adapt the system to the mutations of social demand. And today the process finds itself facilitated by the increasing tendency toward its exercise by rules of court. Notable is the recent assertion of rule-making power independent of legislative delegation on the part of the Supreme Courts of Colorado<sup>196</sup> and Illinois.<sup>197</sup> But the progress already made has been vast and revolutionary: contrast of the new regime with the old is eloquent of pride-inspiring achievement. With all its shortcomings the new regime has brought us appreciably closer to the unembarrassed search for the truth in civil litigation. The day is perhaps not yet, but is not far distant when one can unreservedly say of its efforts (to borrow the words of the old book from which we drew in opening) that they did "verie willingly roote up the thornie grove of cavils and sophisticall wrangelinges, which had mingled themselves with good

and reasonable exceptions, and scouring the streame of such weedes and sedges, they have nowe made a smoothe and more easie passage for Justice."<sup>198</sup>

## NOTES

<sup>1</sup> FULBECKE, A PARALLELE OR CONFERENCE OF THE CIVILL LAW, THE CANON LAW AND THE COMMON LAW OF THIS REALME OF ENGLAND (1601) 75.

<sup>2</sup> See Guilhaume, *De la persistance du caractère oral dans la procédure civile française* (1889) 13 NOUVELLE REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 40.

<sup>3</sup> "The English forum sometimes treats the study of the civil law with levity, but may its disciples be permitted to say that it never was despised but by those who were ignorant of it." 1 BROWNE, A COMPENDIOUS VIEW OF THE CIVIL LAW AND OF THE LAW OF THE ADMIRALTY (2d ed. 1802) Preface, at v.

<sup>4</sup> SIR THOMAS SMITH, DE REPUBLICA ANGLORUM (Alston ed. 1906) Lib. 2, c. 13, pp. 74-75.

<sup>5</sup> FIRST REPORT OF THE COMMISSIONERS ON THE COURT OF CHANCERY (1852) quoted in FRANCIS, THE NEW COMMON LAW PROCEDURE (1854) 250-251.

<sup>6</sup> 2 REY, DES INSTITUTIONS JUDICIAIRES DE L'ANGLETERRE COMPARÉES AVEC CELLES DE LA FRANCE, etc. (1826) 19.

<sup>7</sup> See Langdell's fine account of the contrast of remedy between law and equity in A BRIEF SURVEY OF EQUITY JURISDICTION (2d ed. 1908) 19 ff.

<sup>8</sup> 8 Coke 66b (1608).

<sup>9</sup> HAYES, CROGATE'S CASE: A DIALOGUE IN YE SHADES ON SPECIAL PLEADING REFORM (1853) as reprinted in 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1926) Appendix, 430.

<sup>10</sup> 4 GEO. II, c. 26.

<sup>11</sup> Co. Litt. 303 b.

<sup>12</sup> 9 GEO. IV, c. 15; 3 & 4 WILL. IV, c. 42.

<sup>13</sup> See 2 REY, *op. cit. supra* note 6, at 188.

<sup>14</sup> See Millar, *The Formative Principles of Civil Procedure* (1923) 18 ILL. L. REV. 104 ff., 150 ff., 156 ff., and as reprinted in ENGELMANN-MILLAR, HISTORY OF CONTINENTAL CIVIL PROCEDURE (1927) 49 ff., 62 ff., 68 ff.

<sup>15</sup> The full quotation in Birrell, *Changes in Equity Procedure and Principles*, A CENTURY OF LAW REFORM (1901) c. 6, p. 182.

<sup>16</sup> 3 Wils. 73, 95, 117.

<sup>17</sup> Odgers, *Changes in Procedure and the Law of Evidence*, A CENTURY OF LAW REFORM (1901) c. 7, p. 223.

<sup>18</sup> BOWEN, IN THE REIGN OF QUEEN VICTORIA: A SURVEY OF FIFTY YEARS OF PROGRESS (1887), as extracted in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 526; Odgers, *op. cit. supra* note 17, at 223.

<sup>19</sup> The observation is that of Spence, author of THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY, quoted by Bowen, *op. cit. supra* note 18, at 529 of the SELECT ESSAYS reprint.

<sup>20</sup> "Nobody who has read the two folio volumes I have already referred to [report of evidence taken by the Chancery Commission of 1824], nobody who has read Parkes' *History of the Court of Chancery*, can deny the essential truth of *Jarndyce v. Jarndyce*." Birrell, *op. cit. supra* note 18, at 192-193.

<sup>21</sup> See Reinsch, *The English Common Law in the American Colonies*, 1 SELECT ESSAYS, *op. cit. supra* note 18, at 367-415.

<sup>22</sup> Wilson, *Courts of Chancery in the American Colonies* (1884) 18 AM. L. REV. 226-255, reprinted in 2 SELECT ESSAYS, *op. cit. supra* note 18, at 779-809; Gager, *Equity, Two Centuries Growth of American Law* (1901) c. 6, p. 130 ff.

<sup>23</sup> *Id.* at 136-138.

<sup>24</sup> Fisher, *The Administration of Equity through Common Law Forms in Pennsylvania* (1895) 1 L. Q. REV. 455-465, reprinted in 2 SELECT ESSAYS, *op. cit. supra* note 18, at 810-823; FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS OF NEW YORK (1848) 72-73.

<sup>25</sup> See T. U. P. Charl. (1824) Pref. p. IV; *Ex parte Grimball*, *id.* at 153, 155 (1808); *Hargreaves v. Lewis*, 3 Ga. 162, 168 (1847); *Nell v. Snowden*, 5 Ga. 1, 4 (1848).

<sup>26</sup> *MARBURY AND CRAWFORD*, DIG. (1802) 292; *PRINCE*, DIG. (1822) 205.

<sup>27</sup> Dissenting opinion of Benning, J., in *Bishop v. Sanford*, 15 Ga. 1, 22 (1854).

<sup>28</sup> *Ray v. Dennis*, 5 Ga. 357, 363 (1848); *McLaren v. Birdsong*, 24 Ga. 265, 269 (1858).

<sup>29</sup> Millar, *Three American Ventures in Summary Civil Procedure* (1928) 38 YALE L. J. 193, 213 ff.

<sup>30</sup> *Id.* at 204 ff.

<sup>31</sup> *Id.* at 199-202.

<sup>32</sup> "An Act to authorize and compel discoveries in courts of law in certain cases." Feb. 16, 1828, Mississippi Laws 1824-1838 (1838) 162-163.

<sup>33</sup> *Merrill v. Everett*, 38 Conn. 40 (1871).

<sup>34</sup> An account of the New York and Massachusetts development in this regard appears in the case last cited.

<sup>35</sup> 2 WILL. IV, c. 39.

<sup>36</sup> 3 & 4 WILL. IV, c. 42.

<sup>37</sup> 3 & 4 WILL. IV, c. 94.

<sup>38</sup> 15 & 16 VICT. c. 76; 17 & 18 VICT. c. 125; 23 & 24 VICT. c. 126.

<sup>39</sup> 15 & 16 VICT. c. 86.

<sup>40</sup> 36 & 37 VICT. c. 66; 38 & 39 VICT. c. 77.

<sup>41</sup> "An Act to simplify and abridge the Practice, Pleadings and Proceedings of the Courts of this State," April 12, 1848, New York Laws 1848, c. 379, pp. 497-565. It was designated as the "Code of Procedure" by supplemental act. *Id.* c. 380, § 1, p. 566. An account of its preparation will be found in HEPBURN, HISTORICAL DEVELOPMENT OF CODE PLEADING (1897) 80 ff.

<sup>42</sup> For the history of the code movement, see *id.*, particularly cc. 4, 5.

<sup>43</sup> See 1 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (14th ed. by Lyon, 1918) § 105 ff.

<sup>44</sup> Butte, *Early Development of Law and Equity in Texas* (1917) 26 YALE L. J. 699; TOWNES, PLEADING IN THE DISTRICT AND COUNTY COURTS OF TEXAS (2d ed. 1913) 86, 90. The constitution of 1845 of the Texan Republic declared against the separation.

<sup>45</sup> § 62 (CODE OF 1849, § 69).

<sup>46</sup> §§ 91, 93 (CODE OF 1849, § III, 113).

<sup>47</sup> Statutory references in CLARK, HANDBOOK OF THE LAW OF CODE PLEADING (1928) 46 n. 24, 96 n. 17.

<sup>48</sup> § 24.

<sup>49</sup> § 25. This provision was followed in the Connecticut reform of 1879. CONN. GEN. STAT. (1930) § 5436. Maitlands's minimization of its importance [EQUITY, ALSO THE FORMS OF ACTION (1909) 16-17] is in harmony with his view of no conflict between equity and law. On this point, see the extracts in 1 COOK, CASES AND OTHER AUTHORITIES ON EQUITY (2d ed. 1932) 96 ff.

<sup>50</sup> Home Insurance Co. v. Atchison T. & S. F. R. R. Co., 19 Colo. 46, 53, 34 Pac. 281, 284 (1893).

<sup>51</sup> [1931] 1 K. B. 148, 151.

<sup>52</sup> 234 N. Y. 457, 138 N. E. 406 (1923).

<sup>53</sup> 7 App. Cas. 235, 239 (1882).

<sup>54</sup> BALL, THE NEW PROCEDURE RULES 1932 ANNOTATED AND EXPLAINED (1932) 16. This right was restricted by the New Procedure Rules of 1932 [Millar, *The "New Procedure" of the English Rules* (1932) 27 ILL. L. REV. 367] and now since 1933, under the ADMINISTRATION OF JUSTICE (Miscellaneous Provisions) ACT of that year (23 & 24 GEO. V, c. 36), obtains only when there is in issue a charge of fraud or a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage, and not then if the court is of opinion that the trial will require "any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury."

<sup>55</sup> See BALL, BURNAND, WATMOUGH, CLARK AND HILLS, ANNUAL PRACTICE (1935) 599.

<sup>56</sup> Statutory and other references in CLARK, *op. cit. supra* note 47, at 21 n. 66, 56 n. 51, 62 n. 72. Under its existing law Arizona exhibits, for equitable issues, the paradox of a mandatory advisory verdict. ARIZONA REV. CODE (Struckmeyer, 1928) § 3829; *Light v. Chandler*, 33 Ariz. 101, 261 Pac. 969 (1928); *Rundle v. Winters*, 38 Ariz. 239, 298 Pac. 929 (1931).

<sup>57</sup> BLISS, CODE PLEADING (3d. ed. by Johnson, 1894) 8; CLARK, *op. cit. supra* note 47, at 47: see statutory references in note 25 to page cited.

<sup>58</sup> *Mines Royal Societies v. Magnay*, 10 Exch. 489, 156 Eng. Rep. 531 (1854); *Wodehouse v. Farebrother*, 5 El. & Bl. 277, 119 Eng. Rep. 485 (1855).

<sup>59</sup> Statutes and decisions cited in Gwyn, *Actions*, 1 C. J. 1052-1053.

<sup>60</sup> 260 U. S. 235, 43 Sup. Ct. 118 (1922).

<sup>61</sup> 55 Sup. Ct., p. xxxix.

<sup>62</sup> May 9, 1935, 55 Sup. Ct., p. xxv. [Since the present article was written, there has been published on the part of the advisory committee appointed by the order of June 3, 1935, a PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA (May 1936), in which provision is made for "one form of action and one mode of procedure" (Rule 2) with union of legal and equitable claims as well as of legal and equitable defenses (Rule 12 [b]).]

<sup>63</sup> CODE OF 1848, § 143; CODE OF 1849; § 167; New York Laws, 1852, c. 392, p. 655.

<sup>64</sup> As to Iowa, Kansas, Wisconsin, and Michigan, Blume, *A Rational Theory for the Joinder of Causes of Action*, etc. (1927) 26 MICH. L. REV. 26-30; CLARK, *op. cit. supra* note 47, at 300.

<sup>65</sup> *Chevalier v. Rusk*, Dallam, 611 (Tex. 1844); *Clegg v. Varnell*, 18 Tex. 294 (1857); *Hudmon v. Foster*, 231 S. W. 346 (Tex. Com. App. 1921).

<sup>66</sup> § 41.

<sup>67</sup> 38 & 39 VICT. c. 77, First Schedule, Ord. XVII.

<sup>68</sup> *Smurthwaite v. Hannay*, [1894] A. C. 494; *Sadler v. Great Western Ry. Co.*, [1896] A. C. 450.

<sup>69</sup> *E. g.*, *Thomas v. Moore*, [1918] 1 K. B. 555.

<sup>70</sup> The provisions of Rule 4, Ord. XVI, remain as originally adopted in the Rules of 1875, where they appeared as Rule 3, Ord. XVI. The part relevant in the present connection is: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative."

<sup>71</sup> *E. g.*, *Universities of Oxford and Cambridge v. Gill*, [1899] 1 Ch. 55; *Payne v. British Time Recorder Co.*, [1921] 2 K. B. 1.

<sup>72</sup> Statutory references in CLARK, *op. cit. supra* note 47, at 255 n. 80, 271 n. 158.

<sup>73</sup> For New York, see *Ader v. Blau*, 241 N. Y. 7, 148 N. E. 771 (1925), L. 1935, c. 339 *amd'g* C.P.A. as to § 258; for New Jersey, SUPREME COURT RULES 21, 211 (b) in *I SHEEN*, NEW JERSEY LAW PRACTICE (2d ed. 1931) §§ 521, 711, pp. 384, 513 [see CLEVINGER, PRACTICE MANUAL OF NEW YORK (1935) C.P.A. p. 186, note to § 258]; CLARK, *op. cit. supra* note 47, at 255 n. 80; for California, *ibid.*, and *cf.* CODE CIV. PROC. § 427.

<sup>74</sup> §§ 24, 25, 43 (1), 44.

<sup>75</sup> Millar, *The Joinder of Actions in Continental Civil Procedure* (1933) 28 ILL. L. REV. 203.

<sup>76</sup> New, that is to say, in the sense of a standard term. The commissioners who reported the revised Iowa Code of 1860 refer to use of the term in 1717 in BROWN, CASES IN PARLIAMENT, 587. IOWA REVISION OF 1860, note to § 2889, pp. 524-525.

<sup>77</sup> New York Laws 1852, c. 392, p. 654, *amd'g* § 150, CODE OF 1849.

<sup>78</sup> Blume, *supra* note 64, at 49; CLARK, *op. cit. supra* note 47, at 439-441, 444-445.

<sup>79</sup> § 1740.

<sup>80</sup> DIG. ARK. STAT. (Crawford & Moses, 1921) § 1195.

<sup>81</sup> CLARK, *op. cit. supra* note 47, at 445-446; Blume, *supra* note 64, at 49. The Arkansas statute, in case of a plurality of plaintiffs or defendants or both, does not require, for the counterclaim, the same identity of party relation with the original demand as is here prescribed by the Iowa law. CLARK, *loc. cit. supra*.

<sup>82</sup> §§ 38, 44 (1).

<sup>83</sup> § 24 (3).

<sup>84</sup> JUDICATURE ACT OF 1873, 36 & 37 VICT. c. 66, Schedule, Rule 20.

<sup>85</sup> Ord. XIX, rr. 2, 3.

<sup>86</sup> See CLARK, *op. cit. supra* note 47, at 445.

<sup>87</sup> "The framers of the Judicature Act probably intended that the existing set-off should merge in the new counterclaim. They nowhere stated what the distinction was between the two: still less did they suggest that it was to be preserved. It has, however, been found necessary to maintain it. This is perhaps unfortunate, but it was difficult to avoid it." ODGERS, PRINCIPLES OF PLEADING AND PRACTICE (11th ed. 1934) 238.

<sup>88</sup> *Id.* at 239.

<sup>89</sup> *Cf.* Blume, *supra* note 64, at 59.

<sup>90</sup> See CLARK, *op. cit. supra* note 47, at 440.

<sup>91</sup> *Id.* at 138 ff., 410-412, 479 ff. As to dilatory defenses see also ILLINOIS CIV. PRACT. ACT 1933, §§ 43 (3), 50 (4).

<sup>92</sup> In a large class of cases the statement of claim may come by way of special indorsement of the writ of summons (Ord. III, r. 6). Moreover, it is entirely possible that the master will direct the cause to proceed without pleadings. ODGERS, *op. cit. supra* note 87, at 49, 70.

<sup>93</sup> Rules of 1875, 38 & 39 VICT. c. 77, First Schedule, Ord. XXIV, r. 1; present Ord. XXIII, r. 1, and note in ANNUAL PRACTICE 1935, 418.

<sup>94</sup> ANNUAL PRACTICE 1935, note to Ord. XXV, r. 1, p. 422. The words "plain and obvious" come from Hubbuck v. Wilkinson, [1899] 1 Q. B. 90, 91, there cited.

<sup>95</sup> Ord. XXI, r. 20 and notes in ANNUAL PRACTICE 1935, pp. 389, 2379; Ord. XII, r. 30

<sup>96</sup> Ord. XIX, r. 4.

<sup>97</sup> The situation as of 1928 is described in CLARK, *op. cit. supra* note 47, at 172.

<sup>98</sup> For details see *id.* at 142-146.

<sup>99</sup> Ord. XXI, r. 9. Provisions of the kind have latterly found entrance into American legislation: see CONNECTICUT GEN. STAT. 1930, § 5514; NEW JERSEY SUPREME COURT RULES, Rule 33, in 1 SHEEN, *op. cit. supra* note 73, at § 533, p. 402; MICHIGAN COURT RULES 1933 (Searl ed.) Rule 17, § 10; ILLINOIS CIV. PRACT. ACT 1933, § 41.

<sup>100</sup> CODE OF 1848, § 120; CODE OF 1849, § 142.

<sup>101</sup> See CLARK, *op. cit. supra* note 47, at 512.

<sup>102</sup> Millar, *Pleading under the Illinois Civil Practice Act* (1933) 28 ILL. L. REV. 461, 469, citing FIFOOT, ENGLISH LAW AND ITS BACKGROUND (1932) 161-163. In Kelly v. Metropolitan Ry Co., [1895] 1 Q. B. 944, 946, Lord Esher, M. R., after referring to the old rule, which permitted a passenger injured by negligence of a carrier, to sue either in contract or in tort, significantly says: "At the present time a plaintiff may frame his claim in either way, but he is not bound by the pleadings, and if he puts his claim on one ground and proves it on another he is not now embarrassed by any rules as to departure."

<sup>103</sup> See Clydesdale Bank v. Paton, [1896] A. C. 381, and other cases cited in KEIGWIN, CASES IN CODE PLEADING (1926) 497 n. 3; Lord Parker in Banbury v. Bank of Montreal, [1918] A. C. 626, 709-710.

<sup>104</sup> See CLARK, *op. cit. supra* note 47, at 176-177.

<sup>105</sup> Citations in Millar, *Civil Pleading in Scotland* (1932) 30 MICH. L. REV. 741.

<sup>106</sup> *Id.* at 562 ff., 577 ff., 736, 740-742.

<sup>107</sup> See TENTATIVE PROPOSALS FOR CHANGES IN CIVIL PROCEDURE AND PRACTICE, FORMULATED BY THE COMMITTEE ON LAW REFORM OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (JUNE, 1931) 14; Dayton, *A Program of Legal Reform in the United States* (1931) 16 THE CONSENSUS, NO. 3, p. 21; Millar, *Multiplying Edward Longfield—Unitary Demands and Plural Counts* (1932) 16 J. AM. JUD. SOC. 48; Millar, *supra* note 102, at 467 ff.

<sup>108</sup> The requirement of Ord. XIX, r. 4, to the effect that the pleading shall state the material facts upon which the party relies is obviously to be construed in the light of the forms which the Rules themselves prescribe in Appendices C, D, and E.

<sup>109</sup> Whittier, *Notice Pleading* (1918) 31 HARV. L. REV. 501, and other articles cited in CLARK, *op. cit. supra* note 47, at 29.

<sup>110</sup> Sunderland, *The Michigan Judicature Act of 1915* (1916) 4 MICH. L. REV. 553; Isaacs, *Logic v. Common Sense in Pleading* (1918) 16 MICH. L. REV. 589. See also MICHIGAN COURT RULES 1933 (Searl ed.) Rule 19.

<sup>111</sup> § 42 (2).

<sup>112</sup> Millar, *supra* note 102, at 461 ff.

<sup>113</sup> Statutory references in CLARK, *op. cit. supra* note 47, at 371. Add ILLINOIS CIV. PRACT. ACT 1933, §§ 34, 45, 48 (4).

<sup>114</sup> Ord. XXV, r. 4; see also *supra* note 94.

<sup>115</sup> In Pennsylvania a preliminary affidavit of defense, commonly known as a "statutory demurrer," takes the place of the usual motion. 12 PA. STAT. ANN. (Purdon, 1931) §§ 385, 471, and notes.

<sup>116</sup> The situation accordingly has brought into use the expression "motion addressed to the pleadings," but this besides being clumsy is itself lacking in definitiveness, for a motion addressed to a pleading is not always on the ground of insufficiency, as, e. g., where it challenges an irregularity in filing.

<sup>117</sup> NEW YORK RULES OF CIVIL PRACTICE, §§ 107, 108, CLEVINGER, *op. cit. supra* note 73, §§ 107-108, III, of R. C. P.

<sup>118</sup> § 48.

<sup>119</sup> The underlying idea, according to the court in First Nat. Bank v. Am. Surety Co., 239 App. Div. 282, 284, 267 N. Y. Supp. 565, 567 (1933), is that "although the complaint states a cause of action, defendant has such a perfect defense thereto that he ought not to be put to the trouble and expense of a trial."

<sup>120</sup> 3 BL. COMM. \*382.

<sup>121</sup> *Ante* p. 216.

<sup>122</sup> Interrogatories: e. g., Virginia, Act of April 16, 1831, Va. Laws 1830-31, c. 11, § 68, p. 65; petition: e. g., Mississippi, Act of February 16, 1828, Miss. Laws 1824-38, 162-163. Professor Sunderland, *Scope and Method of Discovery before Trial* (1933) 42 YALE L. J. 869, has noted the Connecticut statute of 1836 providing for such discovery on motion. (PUB. STAT. LAWS 1836-1837, c. 3.)

<sup>123</sup> Laws of New York 1847, c. 462, pp. 630-631; FIRST REPORT, *op. cit. supra* note 24, at 244-245.

<sup>124</sup> § 343 ff. (CODE OF 1849, § 389 ff.)

<sup>125</sup> See account of the various statutory provisions in RAGLAND, DISCOVERY BEFORE TRIAL (1932), appendix, 267-391, also *id.* cc. 3, 9, and Sunderland, *supra* note 122, at 873-874.

<sup>126</sup> 6 & 7 VICT. c. 85, § 1.

<sup>127</sup> 15 & 16 VICT. c. 86, §§ 10, 12, 14, 19. See Langdell, *Discovery under the Judicature Acts, 1873, 1875* (1898) 12 HARV. L. REV. 151, 165 ff.

<sup>128</sup> 17 & 18 VICT. c. 125, § 51.

<sup>129</sup> Rules of 1873: 36 & 37 VICT. c. 66, Schedule, Rule 25; present Ord. XXXI, rr. 1-11.

<sup>130</sup> See e. g., Sunderland, *supra* note 122, at 875-876. This conviction is not confined to the Anglo-American jurisdictions: see 2 GLASSON & TISSIER, TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANISATION JUDICIAIRE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE (3d ed. 1926) 832-833.

<sup>131</sup> A brief history of the New York practice appears in RAGLAND, *op. cit. supra* note 125, at 334-343.

<sup>132</sup> 1 TIDD, PRACTICE (9th ed. 1828) 589 ff.; 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1858.

<sup>133</sup> *Id.* at § 1859b, and see the statutes in RAGLAND, *op. cit. supra* note 125, appendix.

This majority does not include the federal jurisdiction as regards common-law actions. WIGMORE, *loc. cit.*; RAGLAND, *supra*, at 272.

<sup>134</sup> Ord. XXXI, r. 12 *ff.*

<sup>135</sup> Rules of December 22, 1933, Rule 17: 355 Ill. 21.

<sup>136</sup> For these, Johnson, *Province of the Judge in Jury Trials* (1928) 12 J. AM. JUD. Soc. 77 n. 9; Kolkman v. People, 89 Colo. 8, 300 Pac. 575 (1931).

<sup>137</sup> 5 WIGMORE, *op. cit. supra* note 132, § 2551.

<sup>138</sup> *Id. Supp.* (1923-1934) § 2551*a*, where the indicia are noted.

<sup>139</sup> SMITH, ACTION AT LAW (11th ed. 1873) 162, 180-181; KERR, ACTION AT LAW (1854) 196, 205; Thayer, *Judicial Administration* (1915) 63 U. OF PA. L. REV. 599 *ff.*

<sup>140</sup> SMITH, *loc. cit. supra* note 139; Mead v. Robinson, Barnes (3d ed.) 451, 94 Eng. Rep. 999 (1743); Treacher v. Hinton, 4 B. & Ald. 413, 106 Eng. Rep. 988 (1821).

<sup>141</sup> SMITH, *op. cit. supra* note 139, at 162-163; STEPHEN, PLEADING (Andrews ed. 1894) 181-182.

<sup>142</sup> E. g., Leonard v. Baker, 1 M. & S. 251, 105 Eng. Rep. 94 (1813).

<sup>143</sup> Dalmas v. Kemble, 215 Pa. 410, 64 Atl. 559 (1906).

<sup>144</sup> § 265 of 1851 (§ 220 of 1848) *as am'd* in 1852.

<sup>145</sup> Dalmas v. Kemble, 215 Pa. 410, 64 Atl. 559 (1906).

<sup>146</sup> For these see Note (1935) 13 TEX. L. REV. 209, and Note (1935) 34 MICH. L. REV. 93, the latter of which makes apparent the Minnesota priority in the present instance. Add to the jurisdictions there mentioned Illinois [CIV. PRACT. ACT 1933, § 68 (3), Rules of December 22, 1933, Rule 22: 355 Ill. 26]. In some states a similar practice obtains without statutory aid. Note (1935) 13 TEX. L. REV. 209, and cases cited in Note (1935) 34 MICH. L. REV. 93, 94 n. 6. Under the Michigan statute reservation of the decision on the motion is a *sine qua non* (see *id.* at 99).

<sup>147</sup> 228 U. S. 364, 33 Sup. Ct. 523 (1912).

<sup>148</sup> Baltimore & Carolina Line v. Redman, 295 U. S. 654, 55 Sup. Ct. 890 (1935).

<sup>149</sup> See CLEMENTSON, SPECIAL VERDICTS AND SPECIAL FINDINGS (1905) 171 *ff.*, 188 *ff.*

<sup>150</sup> *Id.* at 18, 24. While use of a somewhat similar practice appears in certain of the earlier English cases, e. g., Cotterill v. Tolly, 1 T. R. 655, 99 Eng. Rep. 1304 (1787), it was later decided in England that the court had no right to question the jury as to the grounds of its general verdict. Mayor and Burgesses of Devizes v. Clark, 3 Ad. & El. 506, 111 Eng. Rep. 506 (1835); Arnold v. Jeffreys, [1914] 1 K. B. 512.

<sup>151</sup> CLEMENTSON, *loc. cit. supra* note 149.

<sup>152</sup> Wisconsin: STAT. 1933, §§ 270.27, 270.28; Texas: REV. CIV. STAT. (1925), Art. 2190. For a detailed study of the practice, see Green, *A New Development in Jury Trial* (1927) 13 A. B. A. J. 715, reprinted in JUDGE AND JURY, 350 (1930).

<sup>153</sup> MICHIGAN COURT RULES 1933 (Searl ed.) Rule 37, § 7.

<sup>154</sup> 1 RICHARDSON, THE ATTORNEY'S PRACTICE IN THE COURT OF KING'S BENCH (1792) 184.

<sup>155</sup> GREEN, *supra* note 152, at 716, 777 *ff.* (JUDGE AND JURY, 335 *ff.*, 360 *ff.*), where the practice is considered at length. An excellent demonstration of the method appears in Porter v. Western N. C. R. Co., 97 N. C. 66, 2 S. E. 581 (1887). The rule referred to originated in 1871 as a rule of court [65 N. C. 705; GREEN, *supra* (716) 338], but, with some variation of language, has since become statutory. CODE 1931, § 584.

<sup>156</sup> See, e. g., Hodges v. Easton, 106 U. S. 408, 1 Sup. Ct. 307 (1882).

<sup>157</sup> Ord. XXXVI, r. 39; Ord. XL, r. 10; Ord. LVIII, r. 4.



<sup>158</sup> FINLASON, AN EXPOSITION OF OUR JUDICIAL SYSTEM AND CIVIL PROCEDURE AS RECONSTRUCTED UNDER THE JUDICATURE ACTS (1877) 107.

<sup>159</sup> § 230.

<sup>160</sup> Laws of New York, 1849, c. 438, § 274, pp. 669-670.

<sup>161</sup> Ord. XVI, rr. 1, 4.

<sup>162</sup> Ord. XIII, rr. 4, 7; Ord. XIV, rr. 4, 5; Ord. XXVII, rr. 3, 5, 6, 8, 9, 12.

<sup>163</sup> ANNUAL PRACTICE 1935, 387, note to Ord. XXI, r. 17.

<sup>164</sup> Cf. 3 SETON, FORMS OF JUDGMENTS AND ORDERS (1901) 2142.

<sup>165</sup> Ord. XVI A, rr. 7, 12.

<sup>166</sup> Parr v. Snell, [1923] 1 K. B. 1.

<sup>167</sup> STEPHEN, PLEADING (Andrews ed., 1894) 431.

<sup>168</sup> Andrews v. Blue Ridge Packing Co., 206 Pa. 370, 373, 55 Atl. 1059, 1060 (1903); Vanatta v. Anderson, 3 Binn. 417, 423 (1811).

<sup>169</sup> 3 Johns. 542 (1808).

<sup>170</sup> 18 & 19 VICT. c. 67; Clark and Samenow, *The Summary Judgment* (1929) 38 YALE L. J. 424.

<sup>171</sup> See *supra* note 92.

<sup>172</sup> Ord. XIV, r. 1.

<sup>173</sup> Ord. XIV, r. 3.

<sup>174</sup> ANNUAL PRACTICE 1935, 173-174.

<sup>175</sup> *Id.* at 180.

<sup>176</sup> Ord. XIV, r. 6.

<sup>177</sup> Ord. III, r. 6, and note in ANNUAL PRACTICE 1935, 14; Ord. XIV A.

<sup>178</sup> See Clark and Samenow, *supra* note 170, at 440 ff.; for Connecticut, PRACTICE BOOK (1934), § 52, p. 34; for New Jersey, SUPREME COURT RULES, Rule 80, 1 Sheen, *op. cit. supra* note 73, at § 580, p. 426; for New York, RULES OF CIVIL PRACTICE, Rule 113, Clevenger, *op. cit. supra* note 73, at 124 of R. C. P.; for Michigan, MICHIGAN COURT RULES 1933 (Searl ed.) Rule 30; and for Illinois, CIV. PRACT. ACT (1933) § 57, Rules of December 22, 1933, Rules 15, 16; 355 Ill. 20-21.

<sup>179</sup> STAT. 1933, § 270.635; § (Rule) 270.635 as effective Jan. 1, 1935: 214 Wisc. v-vi.

<sup>180</sup> History of the legislation in BORCHARD, DECLARATORY JUDGMENTS (1934) 240 ff.

<sup>181</sup> Ord. XXV, r. 5.

<sup>182</sup> See BORCHARD, *op. cit. supra* note 180, at 62 ff.

<sup>183</sup> Ord. LIV A.

<sup>184</sup> BORCHARD, *op. cit. supra* note 180, at 245. For the slight advance previously made see *id.* 244 and, by the same author, *The Uniform Act on Declaratory Judgments* (1921)

34 HARV. L. REV. 697-698.

<sup>185</sup> JUDICIAL CODE, § 274 d; 28 U. S. C. A. § 400.

<sup>186</sup> BORCHARD, *op. cit. supra* note 180, at 245 n. 224.

<sup>187</sup> Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment* (1917) 16 MICH. L. REV. 89.

<sup>188</sup> As to the code motion to make the complaint more definite and certain, see CLARK, *op. cit. supra* note 47, at 236-237.

<sup>189</sup> For the case in America, see Cohen, *Impleader: Enforcement of Defendants' Rights against Third Parties* (1933) 33 COL. L. REV. 1147.

<sup>190</sup> 1 WHITEHEAD, EQUITY PRACTICE, STATE AND FEDERAL (1915) § 344, p. 569 n. 33.

<sup>191</sup> Millar, *Some Comparative Aspects of Civil Pleading under the Anglo-American and Continental Systems* (1926) 12 A. B. A. J. 407.

<sup>192</sup> Millar, *Legal Procedure* (1934) 12 ENCYC. SOC. SCI. 450-451.

<sup>193</sup> FINLASON, *op. cit. supra* note 158, at 89.

<sup>194</sup> From *A TIME TO KEEP* by Halliday Sutherland (1934) 250, we learn that the libel action of *Stopes v. Sutherland, et al.*, which went to the House of Lords (*Sutherland v. Stopes*, [1925] A. C. 47), cost the ultimately victorious defendants £10,000. The crying evil of disproportionate expense is the subject of consideration in MULLINS, *IN QUEST OF JUSTICE* (1931) particularly at 165-168, 197-218, where numerous striking examples are cited.

<sup>195</sup> For a criticism at large of the modern English system, MULLINS, *passim*.

<sup>196</sup> *Kolkman v. People*, 89 Colo. 8, 300 Pac. 575 (1931).

<sup>197</sup> *People v. Callopy*, 358 Ill. 11, 192 N. E. 634 (1934).

<sup>198</sup> FULBECKE, *op. cit. supra* note 1, at 75.

## THE COURTS AND THE DISPATCH OF JUDICIAL BUSINESS

GEORGE W. WICKERSHAM

THE rapid growth of population in the United States during the last half century has put a great strain upon all the organs of our governments, national, state, and local. To meet the problems thus arising, many changes have been made in the executive and legislative departments. The last to receive much attention is the judiciary. Our forefathers brought to America a system of local courts and judges for the disposition of petty offenses or of controversies over small amounts, and superior courts, held by individual judges, with plenary jurisdiction over important causes, with provisions for review of their decisions by the court *in banc*, or by a court of appeals. Under this system, the individual judge himself controlled the disposition of the business which came before him, although from time to time the legislature enacted laws giving preference to one class of cases over another, or prescribed rules of procedure which more or less regulated or controlled the business of the court. The theory of speedy justice always was asserted as an ideal in England and in the Colonies. It was well expressed in that provision in the Constitution of Massachusetts, which declares that,

"Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

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But as the population of England grew, the ideals of speedy and inexpensive justice largely were lost sight of. The administration of civil justice became complicated by the growth and development of the jurisdiction of the Court of Chancery; and while, as early as 1848, the legislatures of American states were abolishing the distinction between the two systems of law and chancery, or equity, and adopting codes of civil procedure, by which a simplified pleading was established, based on the blending of the two, it was not until 1873 that the British Parliament, in the epoch-making Judicature Act of that year, introduced a sweeping reform in the organization of the courts and in the procedure by which civil justice should be administered.

This great enactment followed upon the report of a royal commission, created in 1869 for the purpose of inquiring into the operation and effect of the existing chancery, common-law, admiralty, and criminal courts in England. The first report of that commission struck at the evils arising from the separation of jurisdiction at law and in chancery, and recommended the consolidation of all the superior courts of law and equity, together with the courts of probate, divorce, and admiralty, into one court, to be called "Her Majesty's Supreme Court," in which should be vested all the jurisdiction that then was exercisable by each and all the courts so consolidated. It was proposed that the Supreme Court should sit in divisions, with a Court of Appeal over each and all of such divisions.

The second report of the same commission, made in 1872, dealt with the county courts, which it recommended should be reorganized and become constituent parts or branches of the Supreme Court, with a uniform procedure—all distinction between common law, admiralty, and equity cases being abolished. "The practical question to be solved," ran the report, in language which is as apposite to the problem in America today as it was then to the

English situation, "is, how the judicial and administrative force of the Courts may be best disposed so as to do the largest quantity of work in the simplest, most expeditious and most efficient manner."

The Judicature Act of 1873<sup>2</sup> provided for the fusion of procedure at law and in equity and the establishment of an improved system of administering justice, civil and criminal. It created a Supreme Court of Judicature, into which were consolidated the High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy. The Supreme Court of Judicature now consists of two permanent divisions: His Majesty's High Court of Justice and His Majesty's Court of Appeal.<sup>3</sup> The act of Parliament at present in force is known as the "Supreme Court of Judicature (Consolidation) Act, 1925."

The original jurisdiction of the High Court is general, extends to all causes of action, and is unlimited in amount. All causes and matters brought to the court are distributed among the divisions and judges, as directed by rules of court and statutory provisions, but the lord chancellor is empowered, by order made with the concurrence of the presidents of the divisions concerned, to redistribute business among the divisions. These divisions are: the Chancery Division, the King's Bench Division, the Probate, the Divorce, and the Admiralty Divisions.

The appellate jurisdiction is vested in His Majesty's Court of Appeal, which has jurisdiction to review both the law and the facts.<sup>4</sup>

As the result of a series of enactments by Parliament, running from 1846 to 1924, a number of districts have been established, in each of which a county court is held. The lord chancellor, by

order, may alter the number and boundaries of the districts and the place of holding any court. He may order the consolidation of one or more districts, or the division of any district. He may direct that there shall be two judges for one district, each with the powers of a single judge, and he has power to redistribute districts among the judges. The power of appointing county-court judges is in the hands of the lord chancellor. Their number must not exceed sixty. Generally speaking, the county court has jurisdiction to entertain all personal actions, whether arising out of contract or tort, where the debt demanded or damage claimed is not more than one hundred pounds. Actions commenced in the High Court of Justice may be transferred by that Court to the county court, when the amount in dispute does not exceed one hundred pounds.<sup>5</sup> After January 1, 1934, appeals from judgments of a county court lie directly to the Court of Appeal.

A Council of the Judges of the Supreme Court is required to assemble at least once in every year, to consider the operation of the applicable acts of Parliament and the rules of court and the working of the offices of the Supreme Court, and to inquire into any defects which may appear to exist in the procedure or administration of law in the High Court, or Court of Appeal, or in any inferior court from which an appeal lies thereto. The Council must report annually on what amendments and additions it thinks expedient for the better administration of justice. The power to make rules to regulate the practice and procedure of the Supreme Court is now vested in a rule committee composed of certain judges, two barristers, and two practising solicitors.

The Court of Appeal, as at present constituted, is composed of five judges. The High Court of Justice embraces, besides the lord high chancellor and the lord chief justice of England, who are also ex-officio judges of the Court of Appeal, twenty-six justices. There are fifty-six judges of the county court. Therefore, for all of

England and Wales, with a population of little less than forty million, according to the census of 1931, there were only about ninety-two judges of the supreme and county courts, while in the state of New York alone, with a population of less than thirteen million, according to the 1930 census, there are one hundred and twenty-seven judges of the Supreme Court, not to speak of judges of the inferior and the city courts and county courts. In the City of New York, with a population of a little less than seven millions—including the suburbs, nearly eight millions—there are fifty-eight justices of the Supreme Court; twenty-one of the City Court; eight in the county courts of Bronx, Kings, and Richmond; besides nine of the Court of General Sessions (the principal criminal court); sixteen judges of the Court of Special Sessions (minor court of criminal jurisdiction); six judges of the Court of Domestic Relations, and sixty-three judges of the Municipal Court, having jurisdiction in limited amounts.

Until recently, complaints of congestion in the courts, with resulting delay in the administration of justice, to a large degree have been met by increasing the number of the judges, not by reorganizing the business of the courts.

In England, the judges of the superior courts, selected from among the successful barristers, are appointed by the king on the recommendation of the responsible ministers. They hold office during good behavior, receive salaries of about twenty-five thousand dollars per annum, and if they retire because of age or infirmity are entitled to an adequate pension. The system established by the laws referred to is flexible. The entire judicial force is so organized that its members may readily be moved from one field to another as the exigencies of current business may require. Rules and orders may easily be modified to meet current requirements, and while, as the report of Lord Haldane's Committee on the Machinery of Government (1918) shows, the bur-

den put upon the lord chancellor as the commander-in-chief of the entire judicial army is very great, yet, in the practical working of the system, the number of judges mentioned, with the aid of certain standing masters, referees, and other subjudicial officers, is able to attend to all the judicial business of England and to keep reasonably abreast of its work.

That the English people are not yet wholly satisfied with these accomplishments is shown by the complaints in the London Chamber of Commerce, which resulted in the appointment by that body of a committee that made a study and report on the cost of English civil justice. After thorough consideration of that report by the lord chancellor, by the Law Society, representing the solicitors, and by the General Council of the Bar, representing the barristers, to which the lord chancellor referred the report for consideration, a set of revised rules of the Supreme Court (new Procedure), 1932, was adopted, which carried out many of the recommendations of the Chamber of Commerce.<sup>6</sup>

In the report of a committee appointed by Lord High Chancellor Haldane, in 1918, to inquire into the responsibilities of the various departments of the central executive government and to advise in what manner the exercise and distribution by the government of its functions should be improved, attention was called to the fact "that an English judge is in a singularly independent position, uncontrolled and to a large extent uncontrollable, and only removable from his office by an exceptional procedure which has never been resorted to in modern times."

Very different is the status of the American judge in most of the states of the Union. Except in a few of the older states, such as Massachusetts, New Hampshire, Maine, Connecticut, New Jersey, and Mississippi, judges of the superior courts of record are nominated in direct primaries, chosen by popular vote, have a tenure of office of from six to ten years, and, in some states, are



subject to recall by popular vote. As a rule, their salaries are very moderate, six thousand dollars per annum being a rather high average. Moreover, while, as the Supreme Court of the United States has said,

“‘Trial by jury,’ in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence.”<sup>7</sup>

in many of the states the judge, whether by constitution or by legislation, has been reduced to the position of moderator, ruling only on requests by counsel, and deprived of the power to control the conduct of a trial or to express opinions.

As the population in the United States has increased, especially in the larger communities, the results of this system have become apparent. Congested calendars, great delay in reaching trial, delays in appeals, multiplicity of appeals, and resulting extravagant cost of obtaining justice have increasingly vexed and hindered suitors in American courts.

Herbert Harley, in his Foreword to W. F. Willoughby's admirable book on *Principles of Judicial Administration*, says:

“All through the last century the courts were relatively expert and responsible. . . . They are still incalculably more responsible and expert than legislatures, their most obvious defect being inability to operate with reasonable promptness. But in fifteen years executive departments have been reorganized in the more populous states, tending toward

responsibility, and enabling them to compete with the courts for sovereign power. . . . The courts have been smothered with litigation, in both trial and appellate branches. Delay has begotten delay, for congested dockets are an open invitation to every rascal to defy his creditors and entrench himself for several years behind judicial process and procedure."

Mr. Willoughby himself, in his Preface, written only six or seven years ago, observes:

"Though constituting the primary function of government, there is probably no single thing that our governments do with less efficiency and economy than the administration of the law."

A commission appointed by the governor of the state of New York to investigate the Municipal Court of the City of New York, in February 1924, reported:

"The business of this court is transacted by forty-eight justices in twenty-five independent court houses, scattered throughout the five boroughs. It is a loose association of forty-eight Justices of the Peace and their clerks and attendants. It represents an unsuccessful effort to merge forty-eight Justices of the Peace into a metropolitan court. The result is that it possesses the vices of both and the virtue of neither." <sup>8</sup>

As lately as August 1934, a judge of the Superior Court of Los Angeles County, California, wrote in the *Journal of the American Judicature Society*:

"We have fifty judges, each a king in his own right, no one under the authority or direction of another, no one under the leadership or guidance of another, each enjoying an autonomy that privileges him to determine his own working hours, his own manner of working, his own policies, his own period of vacation, his own efforts (if any) to improve the quality of his work, and, of course, his own rulings." <sup>9</sup>

In November 1921, Benjamin N. Cardozo, then an associate judge of the Court of Appeals of the State of New York, delivered an address before the Association of the Bar of the City of New York<sup>10</sup> in which he deftly turned the responsibility of the judiciary for the above described condition to the courts by saying:

"The courts are not helped as they could and ought to be in the adaptation of law to justice. The reason they are not helped is because there is no one whose business it is to give warning that help is needed." Today, he said, "courts and legislature work in separation and aloofness. The penalty is paid both in the wasted effort of production and in the lowered quality of the product."

The task of mediation between legislatures and courts, he maintained, was that of a ministry of justice. The duty must be cast on some man, or group of men, "to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged."

The thought was not new, Judge Cardozo said; Dean Pound had expressed the same idea four or five years previously. But Judge Cardozo gave precision to the conception. A single committee, he urged, must be organized as a ministry of justice. It was to do for law what the Rockefeller Institute for Medical Research is doing for medicine. Such a ministry should be made up of representatives of the faculties of law or political science of institutes of learning, and of the bench and the bar. It would not only observe for itself the workings of the law as administered day by day,

"it would enlighten itself constantly through all available sources of guidance and instruction; . . . through study of the law reviews, the journals of social science, the publications of the learned generally; and through investigation of remedies and methods in other jurisdictions, foreign and domestic."

In the end, the ministry would make recommendations, of which the public would be informed. The bar and others interested would debate them. The legislature might reject them.

"But at least the lines of communication will be open. The long silence will be broken. The spaces between the planets will at last be bridged."

Never did suggestion from bench or bar fall upon more fertile field than did this epoch-making address. As Judge Cardozo said, in closing:

"The time is ripe for betterment. . . . The law has 'its epochs of ebb and flow.' One of the flood seasons is upon us."

In 1919, the Legislature of Massachusetts had created a Judiciary Commission to investigate and report upon all phases of the judicial system of the state. This Commission made a partial report in 1920 and a final report in 1921. Pursuant to its recommendations, by a law taking effect April 12, 1924, the legislature provided for the creation of a judicial council, composed of five judges and four lawyers, "to make a continuous study of the organization, procedure and practice of the courts."

This council was directed to report annually to the governor upon the work of the various branches of the judicial system. It was also charged to submit from time to time for the consideration of the justices of the various courts, such suggestions in regard to rules of practice and procedure as it might deem advisable.

Pending consideration of these matters in Massachusetts, the state of Ohio, on April 28, 1923,<sup>22</sup> passed (over the governor's veto) an act providing for a judicial council in that state. This enactment was the first tangible fruit of Judge Cardozo's recommendation. That law provided for a judicial council of nine members,

"for the continuous study of the organization, rules, and methods of procedure and practice of the judicial system of the State of Ohio, the

work accomplished and the results produced by that system and its various parts."

The council was to be composed of the chief justice and two associate justices of the state Supreme Court; the chief justice of the Court of Appeals of the state; one Common Pleas judge; one municipal judge; and three practising lawyers, to be appointed by the governor. It was required to report biennially to the legislature on the work of the various branches of the judicial system, with its recommendations for modification of existing conditions. It was also authorized to submit, from time to time, such suggestions with relation to rules and practice and procedure as it might deem advisable for the consideration of the judges of the various courts.

Other states rapidly followed with similar legislation. Up to February 1935, twenty-seven states had created judicial councils, but in two of them (Oregon and North Carolina) the laws creating the councils were afterwards repealed.<sup>22</sup>

In his work on *Principles of Judicial Administration*, Mr. Willoughby has a chapter on "Judicial Councils," which gives an excellent summary description of the powers and duties devolved upon each of those bodies in some twelve or thirteen of the states.

The members of the different judicial councils have shown a commendable appreciation of the fact that they all have many problems in common. In 1929, 1930, and 1931, representatives of the various councils met in the National Conference of Judicial Councils and discussed their function, problems, and proposed solutions. Judge Harry A. Hollzer, chairman of the National Conference during its first two years, said at the Conference of 1931:

"While it is true that the various judicial councils differ more or less with respect to the composition of their membership, and although a

few have more powers or a larger jurisdiction of usefulness than others, it is equally clear that the basic or primary functions of all judicial councils are the same.

"Every Council is a fact finding body.

"Each is charged with the responsibility to survey the condition of business in the several courts within its respective jurisdiction.

"Each is expected to present such recommendations as may seem in the interest of simplification, expedition, efficiency and economy, in the operation of the courts.

"Each is intended to conduct a continuous study of the judicial system in operation, to gather the facts pertinent to the same, and to recommend the changes designed to effect improvement—all to the end that the administration of justice shall be improved." <sup>13</sup>

The Judicial Council of New Jersey, in its first report, dated December 15, 1930, expressed the opinion that every litigant is entitled: (1) to a prompt and efficient trial of his case, (2) at reasonable cost, (3) to be represented by competent attorneys, (4) before impartial, experienced and competent judges, (5) with the privilege of a review of the trial court's determination by an appellate tribunal, composed of similar judges, who will render a final decision within three to four months of the time the appeal is initiated.

In its second report, they recommend laws to give

"the power to mobilize the judicial 'man power' of the law courts in whatever part of the State to the Chief Justice as the 'General' of the judicial forces on the law side, as he shall think necessary to expedite the administration of justice."

The immediate evil resulting from the lack of effective organization of the courts, especially in the large cities of the country, is the great delay in reaching cases for trial after issue joined. This enables unscrupulous debtors to delay settlement of claims against them for months, and even years.

Delay in the administration of justice, in many cases, amounts to denial of justice. Even before the organization, or the full operation, of judicial councils, the bench and bar began to grapple with the problem of congested calendars and delayed justice. Homer G. Powell, chief justice of the Court of Common Pleas of Cleveland, Ohio, in an address before the representatives of the National Conference of Judicial Councils, at its annual meeting in September 1931,<sup>14</sup> gave a succinct account of the plan, which had been adopted in that court, of putting the calendar of causes in the charge of one official charged with the duty to keep the judges constantly supplied with cases, so that the old delays of calendar calling, which wasted so much of the trial court's time and that of jurors, counsel, parties, and witnesses, was brought to an end. This so-called Cleveland Plan has been more or less adopted in a number of other cities, with very satisfactory results.

In the spring of 1924, the president of the Association of the Bar of the City of New York appointed a committee to investigate the causes of existing calendar congestion and of delays in the administration of civil and criminal justice in the First Judicial District (counties of New York and the Bronx), and to study the ways and means by which such congestion and delays might be avoided. Upon the recommendation of that committee, the Appellate Division of the Supreme Court in the First Department appointed a committee of lawyers and judges, which made a very thorough study of the conditions then existing in the courts and submitted three reports, during the continuance of its activities, in which it made a series of recommendations that were in part carried out by the Court and in part by the legislature, thus accomplishing a number of reforms that have greatly reduced the congested condition of the court calendars.

The committee's first report thus described the condition of

the pending judicial business in the Supreme Court, the City Court, and the Municipal Court in the First District:

There were pending in the three courts, just before the January 1927 call,

"in the Supreme Court of New York County 29,446 cases triable by jury; and a case could not ordinarily be reached for trial for 22 months after it was at issue. There were pending in the Supreme Court for Bronx County 9,562 cases triable by a jury, and a case could not be reached for trial for 24 months after it was at issue. There were pending in the City Court, of New York County, about 18,000 cases triable by jury, the delay in reaching a case for trial being 16 months. At the same time, there were pending in the Municipal Courts 59,086 cases triable by jury, and, as stated above, a case could not be reached for trial in crowded districts for a year and a half."

The committee further reported (in 1927) that a large proportion of the cases placed on the trial calendar are not disposed of by inquest or jury trial.

"Taking the year 1924," they said, "for example, as showing the recent trend, it appears that in that year, out of 15,923 cases disposed of, 12,147, or over 76 per cent were disposed of without trial by discontinuance, abatement, reference or otherwise. In the years 1919 to 1923, inclusive, the cases disposed of without a jury trial varied between 70 and 75 per cent, except in 1923, when it rose to 80 per cent of the cases which disappeared from the calendar."

"The presence of these cases on the general calendar," the Committee observed, "undoubtedly caused uncertainty and delay in reaching those of later issue which were awaiting an opportunity for trial."

Excellent as were the measures taken by the Court on the recommendation of the Appellate Division's committee, it was apparent that only a legislative commission could deal adequately with the conditions revealed in the committee's reports. At the



session of 1931, therefore, a commission was created by act of legislature, "to investigate and collect facts, relating to the present administration of justice in the state, and to present recommendations for its improvement."<sup>15</sup>

This commission, in its report to the legislature dated January 25, 1934,<sup>16</sup> reported that the major criticism of justice in the state of New York, that it is slow, was well founded and understated rather than overdrawn,

"and that there is unwarranted delay in nearly every court of the State and in nearly every section of the State. In some courts and in some counties the delay amounts to a positive denial of justice."

The commission expressed the opinion that great improvement in the administrative practices of the courts might be effected by the courts themselves. It was of opinion that the principal solution of the problem did not lie in changes in trial procedure, but on the administrative side. They condemned the existing system of assigning justices of the Supreme Court to work outside the districts in which they are elected, only on their own personal consent. Such assignment, they urged,

"should be made as a part of a state-wide system of handling the personnel of the court, with the primary object of using it to its maximum capacity for relieving delay, and as a part of this process, so coordinating the work of the court in the counties where such work is light as to make it possible to release the judges for work in counties where work is congested."

"We find," the commission further said, "that the present facilities of the Supreme Court are probably sufficient and the number of judges of the court adequate to render prompt service, provided modern administrative control prevails and the court is administered as far as possible as a state-wide organization and the cases now in arrears are removed.

"In many States the administrative control of courts, with a jurisdiction comparable to that of our Supreme Court, is in the hands of the Chief Justice. This plan is not used in New York, and it is doubtful if it be applicable here, but we know of no court of importance, except the Supreme Court of this State, that has no administrative head."<sup>17</sup>

As a result of its consideration of this problem, the commission recommended the creation of a judicial council, which the legislature almost immediately created.<sup>18</sup> It further urged that the present system of assigning justices of the Supreme Court to work outside the districts in which they are elected, only on their own personal consent, as is the practice at present, should be changed, and that there should be introduced some system which would make the whole judicial force elastic and susceptible of assignment to places where it was needed. It also recommended that provision be made by rule of court, or by legislation if necessary, by which the supervision of the administrative work of the supreme court in each county or district, as the case might be, should be placed in the hands of one justice, chosen because of special qualifications for administrative work, and that provision be made for him to hold this post for at least one continuous court year.

These recommendations embody the principles of modern judicial organization as it should be adopted in the older and more congested communities of the country. The judicial establishment can no longer be considered as made up of a large number of independent judges. It is an organization of many members, who should be mobilized so as to be distributed in the most effective way to meet the demands of the prompt administration of justice. Just how this task shall be performed must depend upon circumstances. In some communities, there is an administrative judge with power to assign judges to the various parts or divisions of the court, as the exigencies of the moment

may require. In others, the chief justice, or a committee of judges, makes the assignments. All constitutional and statutory provisions that hamper the courts in carrying out these duties should be repealed. The management of the calendars should be placed under the control of a judge, or a clerk, with powers adequate to enable him, in coöperation with the bar, to keep the sitting judges constantly supplied with cases, so that there shall be no waste of time of suitors, court, or jurors in listening to such discussions as in the past have consumed much of their time.

Despite the appointment and the recommendations of judicial councils, calendars of causes in many of our cities still are from one to three years in arrears.

As late as the Autumn of 1933, a committee on judicial procedure was created by the directors of the Boston Chamber of Commerce, of which Dr. A. Lawrence Lowell, former president of Harvard University, was chairman,

"because the number of civil cases awaiting trial in the Superior Court of the Commonwealth had become so great that the delay in obtaining justice was a serious injury to the community; and the attempts made by the Bench and Bar to correct this and other evils arising out of the present system of judicial procedure had been so ineffective that the arrears in pending cases were constantly increasing."

That Committee reported in January 1935 that at the end of the last court year 52,535 civil jury cases were awaiting trial in the Massachusetts Superior Court. Of course, said their report,

"only a fraction of these cases will be tried, but the outstanding fact remains that the average delay between the bringing of a civil jury suit and the date of its trial is now nearly four years in Suffolk and Middlesex Counties, and between two and three years in other counties. These averages are increasing annually as the court slips farther and farther behind."

It is to be hoped that the Legislature of Massachusetts will give more heed to the recommendations of that Committee than it has to those of the judicial council, and will promptly enact legislation adequate to end a condition which the constitution of Massachusetts so clearly has denounced.

The ability of the courts to deal effectively with this problem of organization, to accomplish a speedy dispatch of business, is somewhat affected by the restrictions upon their rule-making powers, which they have suffered to grow. Even in such a state as Massachusetts, the committee of the Boston Chamber of Commerce, above referred to, was in doubt about the existing power of the supreme judicial and superior courts to make and enforce rules adequate to meet the evils of congested calendars and resulting delays and, therefore, felt constrained to recommend that the courts be given by the legislature express power to make their own rules of procedure.

In recent years, however, stung by criticism of unnecessary delays and unsatisfactory results in the administration of justice, a spirit of reassertion of judicial power has shown itself in the courts of a number of states.

Without the guidance of a competent judge, juries are apt to go astray and to render verdicts that the court must set aside, ordering new trials, which cause delays and tend to the uncertainty, the expense, and the unsatisfactory nature of the administration of justice.

The federal courts have never ceased to exercise their common-law power to instruct juries on fact and law, while making it clear that the judge's opinion on the facts of a case is not binding on the jury. In the states, however—probably in most of them—the legislatures gradually have assumed the power to enact rules of judicial procedure, limiting or prohibiting the exercise of this authority, which the courts have accepted as binding upon

them. But recently, as already remarked, the current has changed, and the courts are recognizing their power and their duty to make rules concerning procedure in their own field.

Thus, the Supreme Court of Colorado, in 1931, asserted the right and duty of a trial judge in a criminal case to express his opinion on the evidence, while making it clear that such opinion was not binding on the jury, which remained the final judge of the fact.

"The judicial power of the state," said the court, "is vested in the courts; the legislative and executive departments are expressly forbidden the right to exercise it, and the courts, charged with the duty of exercising the judicial power, must necessarily possess the means with which to effectually and expeditiously discharge that duty; this duty can be performed and discharged in no other manner than through rules of procedure, and consequently this court is charged with the power and duty of formulating, promulgating and enforcing such rules of procedure for the trial of actions as it deems necessary and proper for performing its constitutional functions."<sup>19</sup>

In other states the courts have asserted their inherent power to make rules respecting the admission of attorneys to practise law, rejecting the right of legislatures to interfere with them. That courts have inherent power so to regulate procedure as to enable them fitly to discharge the judicial function would seem to be beyond reasonable dispute.

In his address above referred to, on a ministry of justice, which inspired the whole judicial-council movement, Judge Cardozo recommended that such councils be made up of representatives of the faculties of law or political science in institutions of learning and of representatives of the bench and the bar.

In general, this recommendation has not been followed. North Dakota, Michigan, and Utah require a member of the law-school faculty to be included, but so far as I can learn no state has in-

cluded in the membership of a council a representative of the faculty of political science. Several states have included chairmen of the judiciary committee of one or both of the houses of the legislature, but apparently only one state (Texas) requires the appointment of a layman. In that state, two laymen, one of whom shall be by profession a journalist, are to be appointed by the governor. The excellent work done by the committee of the London Chamber of Commerce and by that of the Boston Chamber of Commerce, to which reference has been made, as well as the thorough study and report on the judicial-council system made by the Committee on Judicial Administration of the Merchants' Association of New York in 1931, very clearly demonstrate the wisdom of including laymen, as well as representatives of the law-school faculties, in a judicial council. Any study of the efficiency of the administration of justice should consider it from the standpoint of the suitors and the jurymen, almost all of whom are not lawyers.

Nor is it enough to establish judicial councils. They must actively demonstrate their usefulness and be vigilant and enterprising in finding out in just what particulars the judicial organization is failing to meet the public need, and how the shortcomings may be overcome. There should be no room for the criticism and suggestions of a chamber of commerce committee in any jurisdiction where a properly constituted judicial council is organized and functioning.

Only by constitutional provision, or appropriate legislation, can a completely "centralized control over a unified flexible and coordinated court system" be accomplished. But even with adequate constitutional or legislative machinery, in the last analysis the ultimate responsibility for the proper functioning of the judicial machine rests with the judges. Judicial councils may point out shortcomings and suggest remedies; the bar can aid with comment and suggestion, and support or thwart the recom-

mendations of the council; but all this will be of little effect unless the judges themselves fall in wholeheartedly with measures of improvement. As the committee of the Boston Chamber of Commerce said:

"The function of the judiciary, one of the three great departments of our government, is to administer justice with all that the word administer implies. That function is not adequately exercised by sitting on a bench and watching justice flow by."

## NOTES

<sup>1</sup> MASS. CONST., Part the First, art. XI.

<sup>2</sup> 36 & 37 Vict., c. 66.

<sup>3</sup> 8 HALSBURY, LAWS OF ENGLAND (2d ed. 1931) 579.

<sup>4</sup> *Id.* at 542.

<sup>5</sup> *Id.* Tit., "County Courts."

<sup>6</sup> See a most interesting article on the subject by Walter P. Armstrong, of Memphis, Tenn., Bar, in AM. LAW JOURN., for Feb., 1933.

<sup>7</sup> Capital Traction Co. v. Hof, 174 U. S. 1, 13-16, 19 Sup. Ct. 580 (1899) cited and followed in Patton v. United States, 281 U. S. 276, 50 Sup. Ct. 253 (1930).

<sup>8</sup> 17 N. Y. LEG. DOC. (1925).

<sup>9</sup> (1934) 18 J. AM. JUD. SOC. 41.

<sup>10</sup> Reprinted in (1921) 35 HARV. L. REV. 113.

<sup>11</sup> Ohio Laws of 1923, 364.

<sup>12</sup> (1935) 18 J. AM. JUD. SOC. 151.

<sup>13</sup> 15-16 *id.* at 110-111.

<sup>14</sup> Reprinted in (1932) 10 TEX. L. REV. 449.

<sup>15</sup> Laws 1931, c. 186; Commission continued by Laws 1932, c. 508; 1933, cc. 28, 261.

<sup>16</sup> N. Y. LEG. DOC. (1934) No. 50.

<sup>17</sup> The constitution of New York provides that the justices of the appellate division in each of the four departments into which the state is divided shall have power to fix the times and places of holding special and trial terms of the Supreme Court held therein, and to assign the justices in the departments to hold such terms; or to make rules therefor. (Art. VI, 2.) While by statute, a justice of the Supreme Court in one department may, on the request of the presiding justice in that department and with the consent of the presiding justice of his own department, be assigned to hold trial or special terms of the court in the department whence the request comes, he is not obliged to accept such designation. (JUDICIARY LAW, § 141.)

<sup>18</sup> Laws 1934, c. 128.

<sup>19</sup> Kolkman v. People, 89 Col. 8, 34, 300 Pac. 575 (1931). See Bibliography on Rule-Making Power (1930) 16 A. B. A. J. 199.

# FEDERAL CRIMINAL LAW

MARTIN CONBOY

## INTRODUCTION

THE federal criminal law, apart from such statutes as deal with particular legislative regulations for the enforcement of which criminal liability is invoked, is contained in the Criminal Code,<sup>1</sup> which in turn rests upon a series of Congressional enactments beginning with the "Act for the Punishment of certain Crimes against the United States" passed in 1790.<sup>2</sup> What additions and changes have been made from that beginning are to be identified, in their historical sequence, with the innovations and changes that have influenced the development of American civilization from the founding of the Republic.

Up to 1825 there was continuous conflict whether offenses against the federal authority, not made crimes by any federal statute, could be prosecuted in federal courts. Out of this controversy grew the "Act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," passed in 1825.<sup>3</sup> From then until the Civil War the slavery issue produced statutes specifying offenses in that connection, and which are still to be found in twenty-six sections of Chapter Ten of the Criminal Code.

After the close of the Civil War, numerous and potent factors influenced the development of our civilization, each change in material conditions being productive of some challenge to fundamental concepts of justice, freedom, or social security. Congress has used, and at times has strained, its constitutional powers in continuing efforts to meet successive phases of the challenge. En-

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actments were so numerous that a revision of laws relating to crimes became imperative, and a code was enacted in 1909.<sup>4</sup> Under pressure of further changes in material conditions, many additions have been made since then, and the demand for still others is active even now. The history of the federal criminal law runs side by side with the history of the United States.

### *The Constitution in Relation to Crime*

A review of the federal criminal law properly begins with a reference to those provisions of the Constitution that are the basis of the law. The Constitution brought into existence a new sovereignty, not a successor to an older sovereignty. "The people of the United States," who brought the new government into being, assigned to it certain powers and imposed upon it certain limitations. Included in the powers given to Congress was the one<sup>5</sup> "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Since all offenses against the United States must be specified by legislative enactment, it is, in a special sense, upon this provision that the Criminal Code rests.

The significance of this section did not escape the attention of those who participated in the debates on the ratification of the Constitution as first presented. George Mason, of Virginia, who was a member of the Constitutional Convention but refused to sign the Constitution, objected, in an address to the Citizens of Virginia,<sup>6</sup> that under this general clause the Congress could, among other things, "constitute new crimes." To this, reply was made by James Iredell, of North Carolina, afterwards associate justice of the Supreme Court.<sup>7</sup> Observing that the Constitution makes reference only to treason, piracy, counterfeiting, and offenses against the law of nations, Iredell continues:

"These are offenses immediately affecting the security, the honor or the interests of the United States at large, and of course must come within the sphere of the Legislative authority which is entrusted with their protection. Beyond these authorities, Congress can exercise no other power of this kind, except in the enactment of penalties to enforce their acts of legislation in the cases where express authority is delegated to them, and if they could not enforce such acts by the enacting of penalties those powers would be altogether useless, since a legislative regulation without some sanction would be an absurd thing indeed."

The Constitution defines just one crime:<sup>8</sup> "Treason against the United States, shall consist only in levying War against them, or in adhering to their enemies, giving them Aid and Comfort." Particular direction is given "to provide for the Punishment of counterfeiting the Securities and current Coin of the United States,"<sup>9</sup> and "to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."<sup>10</sup> And "The Congress shall have Power to declare the Punishment of Treason."<sup>11</sup>

These powers having been assigned, the Constitution imposes certain limitations. As to treason, "No person shall be convicted unless on the testimony of two witnesses of the same overt act, or on confession in open court," and "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted."<sup>12</sup> For the rest, "the trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes have been committed."<sup>13</sup> "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it,"<sup>14</sup> and "no bill of attainder or ex post facto law shall be passed."<sup>15</sup>

Thus far the limitations are imposed by the Constitution as

submitted to the states for ratification. Further procedural restraints upon the power of the government in criminal matters were incorporated in the Articles of amendment. Article IV protects the people "against unreasonable searches and seizures, . . . and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article V protects against being "held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury"; against being subject "for the same offense to be twice put in jeopardy of life or limb"; against being "compelled in any criminal case to be a witness against himself"; against being "deprived of life, liberty or property without due process of law." Article VI ensures to the accused "the right to a speedy and public trial, by an impartial jury of the State and district . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." Article VIII prohibits excessive bail, excessive fines, and "cruel and unusual punishments."

These are procedural limitations upon the United States. After the Civil War, and as aftermath of the controversies incidental to it, a constitutional amendment (Article XIV) was adopted prohibiting the states from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States," and specifically asserting the requirement of due process of law and of "the equal protection of the laws."

Of the powers assigned to Congress,<sup>16</sup> those notably responsible for the specification of federal criminal offenses are the regulating of "commerce with foreign nations, and among the several States"; punishment of counterfeiting; establishment of post of-

fices and post roads; naturalization; bankruptcy; "to lay and collect taxes, duties, imposts, and excises."

The regulation of commerce "among the several States" and the increase of postal facilities have been made the basis of a wide extension of federal criminal jurisdiction. Use of the taxing power accounts for further extension.

All crimes cognizable in federal courts become so by reason of enactments made in assertion of the powers assigned exclusively to the general government, and federal criminal law is concerned with the accumulation of these enactments. Division may be made into three general categories. First are those crimes that imply defiance of, or interference with, an express power of Congress; second, those that involve misuse of facilities provided or regulated by Congress in the application of its powers; and third, those that become federal crimes because committed on territory over which the federal government has jurisdiction, either by reason of its sovereignty or by cession for its governmental purposes. When land is acquired and the state in which it is situated consents to the acquisition, so that there is a cession of jurisdiction to the federal government, acts made crimes by state law are punishable in the federal courts, when the federal law itself does not make such offenses federal crimes (18 U.S.C.A. § 468). There must, however, be a cession of sovereign jurisdiction by the state, as well as acquisition of the land by the federal government, to give the courts of the latter jurisdiction of the offense. Otherwise the land remains under state jurisdiction and such offenses must be prosecuted in the state courts.

The third category would have little place in a historical review were it not for the controversy that was waged over it when the basis of federal criminal jurisdiction was the subject of long and acrimonious debate.

In recent years there have been many enactments that have proved effective in application to supplement powers of the states. Thus, recently, and with acceleration in the last few years, there has been intervention in regard to crimes against person and property—the railroad train, motorcar, and airplane having hampered efforts to punish crimes of violence within the states where the crimes were committed. Previous to the inception of that phase, Congress had been under necessity to seek, and even at times to force constitutional interpretation in finding, the means of achieving purposes beneficial to the general welfare, where the powers available to the states had proved inadequate. Since to prove there has been infraction of the power invoked in creating federal crimes in this category it is necessary to prove the principal offenses, as fraud, extortion, theft, receiving stolen property, kidnapping, homicide—all obviously offenses within state jurisdiction—one consequence of intervention by Congress is a *sub modo* transfer of such crimes to federal jurisdiction, and of the trial of the person accused to the federal courts.

Under pressure of these accretions, and with a view to being relieved of a burden the states seemed to be unable or unwilling to assume, Congress, by an act passed in 1934,<sup>37</sup> invited the states to consider, as an alternative, the formulation of interstate compacts designed to make detection and apprehension practicable through coöperation of state-controlled agencies and to provide for trial and punishment through state courts. Augmentation of federal police agencies and increasing recourse to federal courts, otherwise to be foreseen, might, it was hoped, be averted by the effective adoption of this suggestion.

### *Criminal Law a Reflection of History*

Viewing the provisions of the criminal law in the sequence of their enactment, it is evident that many bear the imprint of the

controversies or conditions of the time. If the federal criminal jurisdiction was held under tight rein up to 1825, it was probably because of widely manifested suspicion that the new government desired to usurp powers intended to be reserved to the states and which the states were determined to conserve. If piracy and its variations had a large place in the early records it was because commerce on the high seas played a great part in the life of states along the Atlantic seaboard. The early laws against slave running opened a struggle that ended only with the Civil War. After the war there was agitation about discrimination in transportation rates and restraints of trade, and new laws were enacted to meet that phase. At the turn of the century prohibition of intoxicating liquor was on its way. Additions to the criminal law were made to aid its progress, and when prohibition came it brought its own load of criminal law. And now, with piracy and slavery and war-time treason and prohibition no longer in the national consciousness and the problems of transportation subject to systematic control, we have the motorcar and the machine gun as factors of the first importance in crime, and a flood of measures enacted by Congress to cope with the exigency.

*Early Difficulties: First Crimes Act, 1790*

Under the power to "constitute Tribunals inferior to the supreme Court,"<sup>18</sup> Congress in 1789 passed the Judiciary Act.<sup>19</sup> One provision was that "the District Courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable *under the authority* of the United States." In 1790 there was passed the first Crimes Act, "an Act for the Punishment of *certain* Crimes against the United States."<sup>20</sup> The offenses listed had to do with treason; piracy; counterfeiting; perjury in federal courts, bribery of federal judges, and other offenses against the administration of federal justice; murder and

other crimes on the high seas; infractions of the law of nations, etc. Besides these, the act made certain provisions implementing the power, conferred by the Constitution, of exclusive authority over "all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."<sup>21</sup> Punishments were prescribed for murder, manslaughter, misprision of felony, maiming, theft, embezzlement, and receiving stolen goods, when the crime related to such places. Arson seems not to have been contemplated. Punishment for that was prescribed in the Act of 1825.

A provision of this statute denied the privilege of exemption from the punishment of death accorded to such persons as clerks or others who could read, which was known as "benefit of clergy" (abolished in England in 1827). Section 31 reads:

"The benefit of clergy shall not be used or allowed, upon conviction of any crime for which, by any statute of the United States, the punishment is or shall be declared to be death."

### *The Common-Law Controversy*

The assumption of jurisdiction over crimes other than those specified in the Act of 1790, committed in places under the sovereignty of the United States, led to contention on the question whether there was a criminal jurisdiction, in federal courts, of a common-law character. There were offenses, other than those mentioned in the Act of 1790, that could and did occur within the areas of exclusive federal jurisdiction, but successive decisions limited the authority of the federal courts to the crimes actually specified. The situation was not adjusted until, in 1825, the jurisdiction was made to include, for places acquired with the consent of the states, "any offense, the punishment of which offense is not

specially provided for by any law of the United States," punishment to be the same as that which the laws of the state provide for the like offense.

Was it necessary for Congress to specify all the offenses that might be committed against the authority of the United States? Most of the early judges thought not—that there were offenses that might come up and that could be dealt with under the usages of the common law. The right so to deal with them, the judges thought, inured in the right of a government to ensure its own existence. Justice Bushrod Washington, for example, was convinced that "there are . . . many crimes and offences against the authority of the United States, which have not been specially defined by law; for, I have often decided, that the federal Courts have a common law jurisdiction in criminal cases."<sup>22</sup>

Thomas Jefferson, for one, thought otherwise. His view on the subject was expressed, with his usual vigor, after a pronouncement by Chief Justice Ellsworth.

In a charge to the Grand Jury of the Circuit Court of South Carolina, in 1799, the chief justice informed that body that they might indict not only for offenses defined in the penal statutes but for "acts manifestly subversive of the National Government, or of some of the powers specified in the Constitution. . . . An offence consists in transgressing the sovereign will, whether that will be expressed, or obviously implied." And further: "By the rules of a known law, matured by the reason of ages and which Americans have ever been tenacious of as a birthright, you will decide what acts are misdemeanors, on the ground of their opposing the existence of the National Government, or the efficient exercise of its legitimate powers."<sup>23</sup>

On this Jefferson commented, in a letter to Charles Pinckney,<sup>24</sup> "I consider all the encroachments made on that [Constitution] heretofore as nothing, as mere retail stuff compared with the



wholesale doctrine, that there is a common law in force in the United States of which and of all the cases within its provisions, their Courts have cognizance. It is complete consolidation."

*"Fictional" Jurisdiction*

The "wholesale doctrine" had already been challenged in 1798. In *United States v. Worrall*,<sup>25</sup> not only was the argument against common-law jurisdiction, which ultimately prevailed, asserted by Justice Chase, but there was foreshadowed much that has marked the later expansion of the number of federal crimes under application of enumerated federal powers.

In the year 1797, one Worrall, who wanted a contract to build a lighthouse, sought to bribe a commissioner of the revenue. Besides making oral instances, he mailed a letter in Pennsylvania and the letter was delivered in New Jersey. He was indicted by a federal grand jury and found guilty. On appeal, his counsel, Mr. Dallas, argued that the offense was not cognizable in a federal court. To the general surprise, Justice Chase agreed with him, on the ground that the United States had no recourse to the common law. The states had received that law from England, but each had varied it. The United States did not derive from England, as the states had, and so had not acquired succession to its laws, which then, moreover, differed from the common law in each of the states.

Mr. Dallas contended, moreover, that while Congress might have made it a crime for the commissioner to take a bribe, it had not done so. Assuming that the commissioner could have been punished for perjury, even so Worrall could not be dragged in, for, if he could, "a source of jurisdiction is opened, which must inevitably overflow and destroy all the barriers between the judicial authorities of the State and the general government." If jurisdiction vested merely because a federal officer was concerned, then,

the "disposition of power to extend the sphere of its influence" being what it is, "fictions will be resorted to." Fictions were not negligible quantities.

"A mere fiction, that the defendant is in the custody of the marshal, has rendered the jurisdiction of the King's Bench universal in all personal actions. Another fiction, which states the plaintiff to be a debtor of the Crown, gives cognizance of all kinds of personal suits to the Exchequer. . . . It may hereafter be sufficient to suggest, that the party is a Federal Officer, in order to enable this Court to try every species of crime."

If Mr. Dallas had thought to attach his reasoning to misuse of the mails, a feature of the actual case, what he foreshadowed as possible would have ranked as a prediction.

### *The Sovereignty Controversy*

When apprehension of "overflow" and of the effect of "fictions" was thus expressed, state sovereignty was much in men's minds. In 1793 the Supreme Court had affirmed the propriety of deciding an action brought by an individual against a state.<sup>26</sup> Decision against the state of Georgia was rendered February 18, 1793. The Eleventh Amendment, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or subjects of any foreign state," was proposed December 2, 1793, and declared adopted January 8, 1798. Again, when the common-law controversy came up for final adjudication, as it did in 1816,<sup>27</sup> the sovereignty issue was very much in evidence through the Supreme Court's asserting the right to entertain and decide appeals from the highest court in Virginia,<sup>28</sup> which had denied the power of the Supreme Court to pass upon its judgments.

*Decision by Inference*

It was in this atmosphere that the conflict of opinion on the extent of the federal jurisdiction was waged. When the conflict ended and the law of 1825 was enacted, federal courts were vested with statutory authority to punish offenses, committed on government property, that were crimes by the laws of those states in which the national government had acquired such property with the consent of the states, and the limited range of crimes of exclusively federal cognizance was extended beyond the recital in the original Crimes Act of 1790.

Two stages had to be passed through before that one was reached. In the first, the claim to federal common-law jurisdiction was effectively denied in two notable cases, *United States v. Hudson*<sup>29</sup> and *United States v. Coolidge*.<sup>30</sup> In the second phase, and largely because of the decisions in these two cases, the efficacy of the federal courts was grievously impaired over a period of nine years.

The curious fact is that, while it is held to be "well settled" by these two cases that "there are no common law offences against the United States,"<sup>31</sup> those who spoke for the Supreme Court did not, in either instance, discuss the subject on the merits, nor were there dissenting opinions, elaborated by members of the court who were openly opposed to the decisions.

The first case, *United States v. Hudson*, originated in the Connecticut District Court and was referred by that court, after long delay, to the Supreme Court. The indictment was based on alleged libel, one of many aimed at Jefferson when president. All the others he had succeeded in having dismissed.<sup>32</sup> Madison, president when the case came on in 1812, was heir to Jefferson's opinions. This no doubt explains why Pinkney, attorney general, de-

clined to argue. So did the opposing counsel. Thereupon, Justice Johnson, for the court, declining to examine how far "an implied power [of any political body] to preserve its own existence . . . is applicable to the peculiar character of our constitution," disavowed that "the courts of that government are vested with jurisdiction over any particular act done by an individual, in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence."

Four years later, in *United States v. Coolidge*, the proceedings were merely perfunctory. Justice Story, in the Circuit Court of the District of Massachusetts, from which the case was referred when the judges were divided, had expressed the opinion that all offenses within the admiralty jurisdiction were cognizable in the circuit court, and, in the absence of positive law, were punishable by fine and imprisonment.<sup>33</sup> The attorney general again declined to argue, in deference to the decision in the *Hudson* case. Justice Story observed that he "did not take the question to be settled by that case." Justice Johnson "considered it to be settled by the authority of that case." Justice Bushrod Washington would divest himself "of all prejudice arising from that case, . . . whenever counsel can be found ready to argue it." Justice Livingston was "disposed to hear an argument on the point. This case was brought up for that purpose." Until it was argued the former decision must stand—and that was all. A few days before, in his opinion supporting Justice Story in the matter of appeals from the Court of Appeals of Virginia,<sup>34</sup> Justice Johnson, after emphasizing the desire "to prevent dissension and collision," had mentioned that "at present, the uncontrollable exercise of criminal jurisdiction is most securely confided to the state tribunals."

In this there was no consolation for the federal judges. District Judge Peters commented, in a letter written the next month,<sup>35</sup> that under the decision

"I cannot carry on the business of my district. Treason is defined by the Constitution; but most other crimes are barely named, tho' their punishments are, for the most part, prescribed. We are forbidden to resort to common law for interpretation, and our jurisdiction of crimes punishable at common law is excluded. . . . Every crime, not defined in our statutes—murder, rape, all the less offences may be committed with impunity in places under the exclusive jurisdiction of the United States." And again: "I had little difficulty before; . . . but now my hands are tied, and my mind padlocked."

The difficulty continued to recur. Thus in 1818, in *United States v. Bevens*,<sup>36</sup> the Supreme Court held, by Chief Justice Marshall, that while, under the Constitution, "the judicial power shall extend to all cases of admiralty and maritime jurisdiction," Congress had not, in the statute of 1790, "so exercised this power as to confer on the courts of the United States jurisdiction over murder . . . committed in the waters of a state where the tide ebbs and flows." Again, in 1820, in *United States v. Wiltberger*,<sup>37</sup> it was decided that manslaughter committed on an American ship in the river Tigris, in China, which being tidal water was not "on the high seas," could not be punished under the act of 1790.

#### SUBSTANTIVE CRIMINAL LAW

##### *The Legislation of 1825*

The statute of 1825, "more effectually to provide"<sup>38</sup> a basis of federal criminal jurisdiction, is, therefore, to be read in the light of these controversies and decisions. In Section 4 "the high seas" is amplified to include "any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States," and under Section 5 offenses committed on an American

ship "while lying in a port or place" in a foreign country were to be punishable in the same way as offenses committed on the high seas, unless the offender was brought to trial in the foreign country. But the important contribution was made by Section 3, which provided that, in any of the places ceded by a state to the United States,

"If any offence shall be committed in any of the places aforesaid, the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon a conviction in any court of the United States having cognisance thereof, be liable to, and receive the same punishment as the laws of the state . . . provide for the like offence when committed within the body of any county of such state."

This provision made punishable crimes that, before the act, the courts of the United States had no authority to punish.<sup>39</sup>

Just as the statute of 1790 had named crimes without defining them, as murder, manslaughter, piracy, and robbery, so in the 1825 statute no definition was given to these and others, as rape, mayhem, and extortion. Circumstances were specified in which offenders would be "guilty of extortion," or "guilty of perjury." Setting fire to government property was not named as arson, but the offense is specified and the punishment fixed. Indeed, in only two instances has Congress seen fit to define a common-law crime. In the Code of 1909 "murder is"<sup>40</sup> and "manslaughter is,"<sup>41</sup> but rape is "the crime of rape"<sup>42</sup> and piracy is "the crime of piracy as defined by the law of nations."<sup>43</sup>

The concluding section of the act of 1825 provides: "Nothing in this act contained shall be construed to deprive the courts of the individual states, of jurisdiction, under the laws of the several states, over offences made punishable by this act."<sup>44</sup>

It is of interest to note, also, that while the act repealed "all acts and parts of acts inconsistent with the provisions of this act," it was "provided nevertheless, that all such acts, and parts of acts,

shall be, and remain in full force for the punishment of all offences committed before the passing of this act."<sup>45</sup>

*Revised Statutes of the United States (1873, 1878)*

After the enactment of the statute of 1825, and up to the close of the Civil War, while there were occasional additions to the list of statutory crimes, they were not numerous and broke little new ground. When the revision, as of December 1, 1873, of the statutes of the United States, known as the Revised Statutes, was made, there were included in the title devoted to crimes some offenses that had been enacted in and before 1820 in connection with Negro slavery,<sup>46</sup> some that were enacted incidental to the war itself,<sup>47</sup> and some that were the sequel to the Fifteenth Amendment.<sup>48</sup> These were reminders of the conflict over slavery and secession that had dominated the period from 1825 to 1865.

The work of revision derives from a statute of 1866 (Act of January 27, 1866), whereby Congress authorized the appointment of three persons, learned in the law, to bring together, in convenient order, all the statutes or parts of statutes then effective, and to "arrange the same under titles, chapters, and sections, or other suitable divisions."<sup>49</sup>

Of the 5,601 sections numbered in this revision, Title LXX, Crimes, accounts for 227, from section 5323 to section 5550. The plan adopted in grouping offenses is indicated by the chapter headings: one, General Provisions; two, Crimes against the Existence of Government; three, Crimes Arising within the Maritime and Territorial Jurisdiction of the United States; four, Crimes against Justice; five, Crimes against the Operations of the Government; six, Official Misconduct, etc; seven, Crimes against the Elective Franchise and Civil Rights of Citizens; eight, the Punishment of Accessories; and nine, Prisoners and Their Treatment.<sup>50</sup>

A further and, in the main, correcting edition, with the addition of all amendments made up to the close of the 1877 session of Congress,<sup>51</sup> was issued in 1878.

#### THE PENAL CODE OF 1909

When, in 1909, Congress passed an "Act to codify, revise, and amend the penal laws of the United States,"<sup>52</sup> there was a difference in the naming of chapters, which at once suggests a considerable extension of scope. Offenses against the existence of government; against the elective franchise and civil rights; against the operations of the government, relating to official duties; against public justice; against the currency and coinage; within the admiralty, maritime, and territorial jurisdiction; piracy, neutrality, and the slave trade all are included, as before—some of them considerably enlarged. The new sections are: Chapter Eight, Offenses against the Postal Service, and Chapter Nine, Offenses against Foreign and Interstate Commerce.

This revision of 1909 was a much more comprehensive effort than any that had preceded it. In the main, the earlier revision had merely compiled existing statutes. In this one Congress labored also to perfect the form. Everything redundant or obsolete was omitted, and such changes or additions as were needed to clarify the intention were freely made.

The history of the revision substantiates this appraisal. That it was necessary is made plain by a passage in the report by which the Congressional Joint Committee on the Revision of the Laws accompanied the presentation of its bill.<sup>53</sup> Referring to enactments since the revision of 1878, the report commented that since then

"more laws of a permanent nature have been passed than had been from the time of the adoption of the Constitution down to the time of that revision. These are scattered through nearly twenty bulky vol-



umes of the Statutes at Large. They are commingled with a voluminous mass of temporary enactments, and are frequently embodied in appropriation bills, the title and context of which would give no indication of their purport, and the very existence of which is discovered only by the trained lawyer and the painstaking student."

There was, therefore, imperative demand for "clear, perspicuous, and systematic compilation." Search for federal statute law, even if all the Statutes at Large, temporary enactments, and appropriation bills mentioned by the committee were not examined, had to be made through the 1878 edition of the Revised Statutes, through a first and second supplement,<sup>54</sup> and through volumes thirty-two, thirty-three, and thirty-four of the Statutes at Large. It was now contemplated to supersede all these by a statute which, when completed and enacted, "will become the original and authoritative law of the land."

#### *Preparation by a Commission*

Preparation for the work of the Joint Committee had been made by a statutory revision commission, appointed under authority of an act of June 4, 1897,<sup>55</sup> whose work at first was limited to revising and codifying the criminal and penal laws of the United States. On June 1, 1898, the commission was instructed, by concurrent resolution, to prepare a code for Alaska, in the emergency occasioned by the gold rush, and it made a report on November 28, 1898. A codification of the postal laws was reported February 10, 1899. On March 3, 1899,<sup>56</sup> the commission was further instructed "to revise and codify the laws concerning the jurisdiction and practice of the courts of the United States, including the Judiciary Act, the acts in amendment thereof and supplementary thereto, and all the acts providing for the removal, appeal and transfer of causes." On November 10, 1899,

a progress report was made to Attorney General John W. Griggs, and by him transmitted to Congress December 18, 1899. Another was made November 15, 1900, and the work of the commission was again enlarged, March 3, 1901,<sup>57</sup> to include "all the laws of the United States of a permanent and general nature in force when the same shall be reported."

A codification of the criminal law was reported May 15, 1901, and copies were sent to bar associations for consideration. The nature of the work may be inferred from the comment of a committee of the Association of the Bar of the City of New York that it considered "the proposed great extension of Federal criminal jurisdiction over the whole field of common law and statutory crime within the territorial and maritime jurisdiction of the United States to be unnecessary and very unwise." The report did, in fact, include, in six subchapters, a great number of proposals new to the federal law and explained in the margin by reference to laws of the several states.

The work of the commission continued and, on March 3, 1905, it was directed to add to its reports any laws enacted since they were made.<sup>58</sup> On June 30, 1906, the commission was required to make its final report by December 15. A report was filed, and the result of the labors of the commission passed into the hands of a Special Joint Committee of Congress on the Revision of the Laws.

### *The Work of the Joint Committee*

The Congressional Joint Committee was appointed by concurrent resolution, approved March 2, 1907.

The codification submitted by the commission with its report incorporated one hundred seventy-four new sections, twenty-one embodying and ten creating new offenses. The Joint Commit-

tee's comment was not altogether sympathetic with the assumption of powers by the commission:<sup>59</sup>

"The Commission interpreted its powers, under the various acts creating it, to authorize it to alter and amend what it deemed the imperfections of existing statutes, and to embody in its work such new legislation as in its judgment was required to supply the inequalities of the existing law. Its recommendations to Congress, based upon this theory report many of the sections altered in form and expressed in different language; many others so changed as to include different subject matters; and many new sections embracing subjects upon which Congress has never attempted before to legislate, but does not exhibit anywhere a simple codification of the existing laws."

On January 7, 1908, the Joint Committee reported on the commission's draft, and submitted a bill, which became a statute March 4, 1909,<sup>60</sup> to take effect January 1, 1910. This is the Criminal Code. It has, of course, been added to and otherwise amended during the intervening years.

It is well to note, since some of the commission's proposals were not concurred in, that the chapter divisions into which it had grouped the laws were retained. Great respect was, indeed, manifested throughout for the legal attainments and the industry of the members of the commission. It was on their motion that the chapters on postal laws and on foreign and interstate commerce were included in the code. As to this last, the Committee said in their report:

"The foreign and interstate commerce has assumed proportions so vast, is growing so rapidly, and legislative enactments pertaining thereto are already so numerous, that it also seemed proper to collect the penal legislation relative thereto under a distinctive head."

In this code, murder and manslaughter, as federal crimes, are for the first time defined. Felony is here distinguished from misdemeanor by sentence to incarceration for more than one year.

Hard labor, instead of being included in penalties, is left to its place in prison discipline. The principle of maximum penalties is established. Old controversies about the locality where murder or manslaughter is committed are determined: "the crime shall be deemed to have been committed at the place where the injury was inflicted."<sup>61</sup> The statute became what the Joint Committee had set out to make it, "the original and authoritative law of the land."

It did not include, however, the penal provisions incidental to taxation, interstate commerce regulation as such, the antitrust laws, pure food laws, etc. For many offenses prescribed by statute, reference was left to the specific enactment.

#### *Change of Emphasis with Change of Scene*

As the offenses noted in the postal and commerce chapters of the Code of 1909 constituted a departure from the conception of criminal law that had been deemed adequate up to the time revision of the statutes was decided upon in 1866, and as those in the commerce chapter were a presage of the vast expansion that was to follow, it may be pertinent here to preface the study of what followed by noting the terms in which James Madison interpreted the effect to be expected from the assignment of certain powers to the general government and the reservation of all others to the states:

"The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state."<sup>62</sup>

In the then conditions, it was a fair assumption that the states could deal with any problems likely to arise within their boundaries. What Madison did not see, in full perspective, was that the boundaries of states would not maintain enclosures within which the process he contemplated would operate effectively, and that new forces were to appear whose pervasive action would transcend all boundaries but those of the nation.

It was the railroads that compelled realization of the change. At first, when each was only a few miles long, they were well within the purview of state control—as much, for example, as were the roads, rivers, and canals that also served the purpose of transportation. It was different when the railroad reached the transcontinental stage and when amalgamations became more and more extensive. Competition preceded combination, and combinations competed. In 1887 there were one hundred and eight railroads in the hands of receivers and under the direction of the courts, a function for which courts were not intended. This was coincident with discrimination in rates charged for transportation, something of which the managements considered themselves the proper judges in the interest of their properties, but against which there was widespread complaint from those who were injured by the discrimination. Demands were made for regulation, and in 1887 Congress responded with “An Act to regulate commerce.”<sup>63</sup> The Interstate Commerce Commission was created by that act. Penal provisions were directed against common carriers and others responsible, when they “wilfully do or cause to be done” anything forbidden by the act, or “wilfully omit or fail to do” anything required by the act.

### *Misuse of Interstate Commerce*

There had been enactments against misuse of the facilities of interstate commerce before 1877. The oldest of these, in 1866, penal-

ized the transportation of explosives on vessels or vehicles carrying passengers.<sup>64</sup> In 1872 the use of the mails for the promotion of lotteries, the circulation of obscene literature, and the furtherance of fraud was prohibited.<sup>65</sup> Likewise, under the commerce power, interstate transportation of lottery tickets was made criminal in 1895,<sup>66</sup> and of obscene literature in 1897. These offenses were carried into the Code of 1909. But before the Code was enacted other specified offenses, whose enactment marked the opening of a new era in the application of the commerce power to the criminal law, were included.

Sections 238, 239, and 240 of the act, which were not in the bill reported by the Joint Committee, were intended to further the campaign for prohibition. Liquor was not to be delivered to a person other than the one to whom it had been consigned; the transportation agency could not collect from the consignee; and the name of the consignee, the nature of the contents, and the quantity contained must be plainly marked on the outside of the package. Violations of these provisions were crimes. Thus the interstate-commerce power was frankly invoked in aid of a highly controversial public policy. Also, under Section 217, it became an offense to send liquor through the mails.

Persuasion by penal enactment was relied upon by the advocates of prohibition before that act and after it. In 1890, the Wilson Act<sup>67</sup> was designed to make liquors brought into a prohibition state subject to the laws of that state. In 1913, under the Webb-Kenyon Act,<sup>68</sup> it was made an offense to ship or transport liquor into any state whose laws forbade its use. In 1917, the Reed amendment to the appropriation bill for the postal service penalized use of the mails to distribute advertisements for liquor or to take orders for it.<sup>69</sup> The Eighteenth Amendment was expected to make up for the disappointments that attended some of this legislation. The Twenty-first Amendment, repealing the Eighteenth,

carries the proviso that no intoxicating liquor may be imported or transported into any state in violation of the laws thereof.

“WE ARE ONE PEOPLE”

In June 1910, less than six months after the Code of 1909 went into effect, further provision against misuse of the facilities of interstate commerce was made, under the Mann Act.<sup>70</sup> In a decision upholding the act, Justice McKenna employed expressions which, when considered, serve as a reminder that, since 1872, Congress had been acting, intermittently, upon a principle that did not come into application until after the Civil War. “Our dual form of government,” he said,<sup>71</sup> “has its perplexities . . . but it must be kept in mind that we are one people . . . and the powers . . . are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.”

The inference is plain. Lotteries, frauds, circulation of obscene literature, prostitution, narcotic addiction, all were, at first, well within what Madison had in mind when he commented that the powers reserved to the states extended to “all the objects which, in the ordinary course of affairs, concern . . . the internal order, improvement and prosperity of the state.” The trouble was that it proved impossible for the states, under their own powers, effectually to preserve “internal order” in these matters when the facilities of the mails were seen to operate, in one fashion, and the privileges of interstate commerce in another, to negative the efforts of any state to suppress the evils. Since the evils complained of were pervasive of the whole nation, and since there were federal powers under which they could be dealt with, Congress from time to time made use of the powers assigned to the general government, singly or in combination, “to promote the general welfare, material and moral.” That was a distinct departure from the earlier conception of the scope to be given the federal criminal law.

*The White-Slave Traffic*

There were plenty of obstacles in the way. Before 1875 women entered the United States under contracts binding them to engage in prostitution. Their presence militated against the "internal order" of the states. Congress began to legislate for the suppression of the traffic in 1875, when entry to the United States was prohibited to women under contract for the purpose.<sup>72</sup> The contracts were declared void, and it was made a felony to hold any woman to such occupation under such contracts. In 1903, the language was changed. Entry of prostitutes was prohibited,<sup>73</sup> the question of contracts did not arise, but it was made a felony to hold any alien woman for prostitution. In 1907 there was another change, this time prohibiting admission of women for prostitution "or for any other immoral purpose,"<sup>74</sup> and making it a felony for any one, within three years of an alien woman's entry into the United States, "to keep, maintain, control, support, or harbor" any alien woman or girl "for the purpose of prostitution or for any other immoral purpose." This, it was decided,<sup>75</sup> was an unwarranted invasion of the powers reserved to the states. However, in 1908 a treaty was made with several European governments on the subject,<sup>76</sup> and in 1910 the Mann Act was passed, the former action being reinforced under the treaty and by enactments specifying offenses as misuse of the facilities of interstate commerce.

The validity of the Act was declared in *Hoke v. United States*,<sup>77</sup> and again in *Caminetti v. United States*.<sup>78</sup> But whereas in the first of these cases Justice McKenna held that the interstate-commerce power had been rightly availed of to "promote the general welfare, material and moral," by the suppression of prostitution, in the second case he felt obliged to dissent from the decision on the ground that its history showed the white-slave law was meant to suppress prostitution, and that its provisions should be construed



in the sense that this was the evil the Mann Act dealt with. The majority held, however, that the words "for any other immoral purpose" must be given their natural significance. These words, therefore, are responsible for the quite general impression, based on numerous later decisions, that the purpose of the Mann Act is very different from the one that, historically, it was designed, and by its author intended, to serve. It is conservative to say that the words have imposed a considerable strain upon the application of the interstate-commerce power.

Here may be mentioned two further applications of that power, which have in them something of the nature of extremes. First, it is unlawful to mail, or to transport in interstate commerce, or to import films of motion pictures of prizefights.<sup>79</sup> Second, there are in effect interstate quarantine regulations of the United States, under an act passed in 1893,<sup>80</sup> which as now revised make it unlawful for venereally infected persons to engage in interstate travel without first having obtained a permit in writing from their local health officer to the effect that such travel is not dangerous to the public health. Enforcement is somewhat conjectural.

### *Pure Food and Drugs*

The "one people" principle has been applied, also, in relation to food and drugs. "[Congress] has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof."<sup>81</sup> A beginning was made, in 1890, against such articles when imported from abroad,<sup>82</sup> and the distribution of adulterated and misbranded articles in interstate commerce was penalized in 1906.<sup>83</sup> Again, while the production and sale of meat can proceed entirely within a state, much of the supply is carried across state lines, and it has been held that inter-

ruption of movement at stockyards does not alter this character.<sup>84</sup> They are "but a throat through which the current flows," and the stoppage could not afford facility for anything that would, under color of law, unduly enhance the price of meat to those who consume it.

### *Narcotic Addiction*

The Harrison Act<sup>85</sup> for the control of narcotic drugs presents another example of powers employed in combination in dealing with a matter of general welfare. Opium and its derivatives, being of foreign origin and therefore articles of foreign commerce, were dealt with, as was the problem to which their importation gave rise, under the commerce power. This proving ineffective, the taxing power was brought in, and it is under the taxing power that regulation has been carried on since 1914.

Opium had been imported since 1832. By 1870, its use had spread from the Chinese on the Pacific coast to vicious white elements. In 1875 California and Nevada realized that control was necessary, and ordinances were enacted in San Francisco and Virginia City. Congress increased the duty on opium to six dollars, then ten dollars, then twelve dollars a pound, but this only led to profitable smuggling, with wider and clandestine distribution of the drug. It was as easily introduced into states that had antinarcotic laws as into any that had not. In 1909 Congress decided to prohibit importation of opium, except in such amounts as were required for legitimate use—import, manufacture, and distribution of this supply to be controlled under regulations issued by the Treasury.<sup>86</sup> Penalties for violations of the act were specified, and illicit drugs were to be seized and forfeited "without the necessity of instituting forfeiture proceedings of any character." What developed was that while importer, jobber, and manufacturer might observe the regulations applying to them, conservation of

the supply for legitimate use, and ultimate disposal for that purpose only, were not realized in practice. In 1914 an international convention was arranged and ratified by the Senate.<sup>87</sup> Then the Harrison Act was passed, setting up an elaborate structure of control under a series of internal-revenue items levied under the taxing power.

When the act of 1909 was under review,<sup>88</sup> Chief Justice White, for the Supreme Court, had no difficulty in affirming that the power to legislate is absolute, that power extends to "the control of those things which are essential to make the power existing and operative," thus disposing of the argument that had been advanced that "the police power, in respect to the public health, morals and social welfare of the citizens of each and every state is solely and exclusively for that particular state." But when the Harrison Act was upheld<sup>89</sup> the Chief Justice dissented. He was one of four who refused to admit that production of revenue was the real purpose of Congress under this act, or that attaching to the taxing power something not within the federal jurisdiction was sufficient to attach it there.

In this connection it should be stated that by the Firearms Act, approved June 26, 1934, the sub-machine gun and the sawed-off shotgun, implements that dominate the new era of crimes of violence, are brought under control, from the time of their manufacture to the latest phase of their distribution, by means of a similar series of internal-revenue items, again bringing in the taxing power as a source of criminal law.<sup>90</sup>

### *Fraud and the Mails*

To establish the fact that crime has been committed in violation of the postal laws in connection with perpetration of fraud, proof must be made of the fraud itself,<sup>91</sup> and that proof may be made even if the fraudulent enterprise be outside the jurisdiction

of Congress.<sup>92</sup> Proof of the fraud and proof of the postal violation being part of one proceeding, and fraud with attendant use of the mails, at times conducted over a wide area, having attained the status of a major industry, the practical result is that the federal courts have to deal with many such cases, some of which occupy the trial court for weeks on end.

### *Restraints of Trade*

While the Sherman Act<sup>93</sup> and the Clayton Act<sup>94</sup> relate in origin to the period of economic controversy that also gave us the legislation on interstate commerce, and while they contain penal provisions, they scarcely belong in the codification of crimes and are not so included. What brought the Sherman Act into existence was the fact that "combinations known as trusts were being multiplied" (circa 1890), "and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally."<sup>95</sup> This, Congress undertook to correct or avert for the future under its power to regulate commerce among the several states. While the main intention was to limit the power of great corporations, it is by no means against only these that the statutes apply. A combination of fish or poultry dealers could as well be brought to book, so long as their operations were based on interstate commerce, and there have been convictions, for extortion practised in city food markets, in federal courts under these enactments.

### *Crime on a Nationwide Basis*

In the contemporary phase of criminal-law enactment, the dominating motive is the desire to meet the challenge of criminals who have organized their operations on a large scale and with flight from state jurisdiction as a part of their strategy. The fast motorcar and the airplane, as well as the facilities of railroad

transportation, have been factors conducing to their success. Congress replied, when the need became manifest, by further application of the interstate-commerce power.

### *Supplementary Legislation*

Crimes connected with robbery from cars and trucks engaged in interstate commerce, and which failed of punishment through the ease with which the participants fled the jurisdiction of the state in which the crime was committed, were logical subjects for federal enactments. But the reason was not so obvious when the interstate-commerce power was invoked by the Dyer Act,<sup>96</sup> in 1919, for the recovery of stolen motorcars that had been driven across state boundaries. After fifteen years of that, Congress, while reluctant to add to the burden of the federal agencies by exerting the interstate-commerce power against receivers of property stolen while in interstate commerce, eventually added that offense also to the lengthening list.<sup>97</sup>

These are only beginnings. Other offenses are kidnapping,<sup>98</sup> threatening to extort money for ransom,<sup>99</sup> moving to another state to avoid prosecution or to avoid giving testimony<sup>100</sup>—all under the interstate-commerce power. These enactments do not deprive the states of jurisdiction over such crimes, but do supplement the effectiveness of the states in dealing with them, and attention has been widely attracted to the activities of the federal investigating agencies in pursuit of those who come under the enactments.

### *The Quality of Federal Criminal Prosecutions*

With all this body of criminal law, enacted from time to time since the first statute of 1790, it is perhaps instructive to observe, from the most recent report of the attorney general,<sup>101</sup> the kinds of crime that engage the attention of the investigating and prose-

cuting agencies of the government. In the fiscal year 1936 the list of cases bears some reflection of the enactments made in each of the periods that have been passed under review. Only 250 were reported guilty of offenses on the high seas and on military and governmental reservations, the class of cases that made the controversy prior to 1825. There were 1,985 convictions for counterfeiting, the preponderance for passing counterfeit money, a crime which dates from the act of 1790 and beyond that to the constitutional direction. There were 2,285 convictions for postal offenses, including 10 that had to do with lotteries, 588 with frauds, and 79 with obscene literature. Embezzlement, also one of the old offenses, accounted, in its several classifications, for 458 convictions. There were 215 convictions for smuggling. Among the interstate-commerce violations there were 296 for prostitution, 37 for kidnapping, 1,559 for stolen vehicles, 505 for theft, 22 for extortion, and 2 for racketeering. Possession of narcotics accounted for 1,376, and other violations of that statute for 817. Violations of the immigration laws produced 3,309 convictions. But the largest item of all has to do with liquor-law violations, of which 17,824 were for evasion of tax and possession of illicit stills. Indeed, liquor-law violations charged, 28,863, were more than half of the total for the period, 53,401, and the 19,182 guilty were well over half of the total, 36,230, found guilty, as charged, of all federal offenses.

The figures just given are for those found guilty as charged. The ratios, however, are not changed by adding those who were found guilty as to part.

### *Interstate Compacts*

The inference from the attorney general's figures is that the administration of federal criminal justice is devoted, in the main, to the punishment of violations of some laws with which the

several states are in no wise concerned, and with others regarding which, in the course of the past sixty years, Congress was moved, by concern for the general welfare, to take concurrent jurisdiction where the circumstances made state legislation ineffective. There remains a considerable body of prosecution, however, that is proper to the states rather than to the general government, and might be left to the states if means can be found to enable them to overcome the present difficulties that stand in the way of apprehension and punishment by the states of criminals who too easily escape the jurisdiction in which their crimes are committed.

The view that means could be found was expressed by the Judiciary Committees of both houses of Congress in 1934:<sup>102</sup>

"The rapidity with which persons may move from one State to another, those charged with crime and those who are necessary witnesses in criminal proceedings, and the fact that there are no barriers between the states obstructing this movement, makes it necessary that one of two things shall be done, either that the criminal jurisdiction of the Federal government shall be greatly extended or that the States by mutual agreement shall aid each other in the detection and punishment of offenders against their respective criminal laws."

Arguing that "clearly the Federal Government cannot assume this jurisdiction and take over this responsibility," the Committee proposed, and Congress enacted, a measure granting "the consent of Congress to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts."<sup>103</sup>

One difficulty in the way of effective state prevention of crime

is that of procuring the presence of witnesses who have left the state's jurisdiction. Under the federal act making this a penal offense such witnesses can be dealt with by the federal authorities, but compacts or uniform legislation are necessary if the states are to compel such attendance. Mutual agreement to ensure the presence of out-of-state witnesses has been tried before, on a limited scale, and the validity of a New York enactment for the purpose has been upheld.<sup>104</sup> Since 1931 a Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases has been adopted by New York and five other states.

*Compact Legislation in New York State*

As this article is written, legislation is under study in the New York Legislature—bills in furtherance of the suggestion made by Congress having been introduced on the initiative of Governor Lehman.

One provides that "any peace officer of another state of the United States who enters this state in close pursuit and continues within this state in such close pursuit of a person in order to arrest him, shall have the same authority to arrest and hold in custody such person, as peace officers of this state have to arrest and hold in custody a person on the ground that he has committed a crime in this state."<sup>105</sup> Another provides for the subpoena and custody of a witness, "in any state which by its laws has made provision" to that effect, for a court proceeding in New York State, and, reciprocally, for subpoena and custody of a witness in New York whose testimony is required in another state. Such witness, when in or passing through the state, shall not, "be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under subpoena."<sup>106</sup> A third provides for out-of-state supervision, or for return, of persons on parole.<sup>107</sup> (The "close pursuit" bill was not



enacted. That concerning witnesses is now Chapter 387 of the Laws of New York, 1936, and that on out-of-state parole, Chapter 388.)

#### FEDERAL CRIMINAL PROCEDURE

It does not appear to be pertinent to a historical review to discuss all the various enactments relating to grand juries, motions directed to indictments, habeas corpus, bail, sentences, appeals, allowance for good conduct, probation, parole, juvenile offenders, and other features of the federal criminal law which are common to every system of criminal-law administration.

It is appropriate, however, to notice procedural matters that have an important place in the development of the federal criminal law, and this review, in so far as it refers to procedural changes, will deal only with those that are especially important. In this connection it is significant that many of such changes have been adopted within a comparatively recent period, and some of the most important as part of the present extension of federal criminal procedure.

There are, as we have seen, procedural regulations in the Constitution, and Title 18 of the United States Code is described in the annotated collection as "Criminal Code and Criminal Procedure," Part 2 containing a compilation of procedural provisions. Under Section 34, the Conformity Section, of the Judiciary Act of 1789, "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." This applies to civil suits at law. Separate provision was made for procedure in suits in equity and admiralty by the act of September 29, 1789.<sup>108</sup>

There is no act of Congress prescribing in express words the general procedure by which the courts of the United States are to

be governed in criminal cases except to the extent covered by Part 27, Title 18, U.S.C. Chief Justice Taney, in *United States v. Reid et al.*,<sup>109</sup> reasoned that the intention of Congress could be found, "by necessary implication, in the acts of 1789 and 1790." The terms in which he elucidated these implications justify extended quotation:

"The 34th section of the Judiciary Act of 1789 declares that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply.

"The language of this section cannot, upon any fair construction, be extended beyond civil cases at common law, as contradistinguished from suits in equity. So far as concerns rights of property, it is the only rule that could be adopted by the courts of the United States, and the only one that Congress had the power to establish. And the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the states. But it could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offences against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this Act of Congress. . . .

"Neither could the court look altogether to the rules of the English common law, as it existed at the time of the settlement of this country, for reasons that will presently be stated. Nor is there any act of Congress prescribing in express words the rule by which the courts of the United States are to be governed, in the admission of testimony in criminal cases. But we think it may be found with sufficient certainty, not indeed in direct terms, but by necessary implication, in the acts of 1789 and 1790, establishing the courts of the United States, and pro-

viding for the punishment of certain offences. And the law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789.<sup>170</sup>

"The Judiciary Act of 1789, sec. 20, provides for the manner of summoning jurors, and directs that in all cases (of course including criminal as well as civil cases) they shall be designated by lot or otherwise in each state, according to the mode of forming juries therein as then practised, so far as the law of the state shall render such designation practicable by the courts or marshals of the United States; and that the jurors shall have the same qualifications as were requisite for jurors by the law of the state of which they are citizens, in the highest court of law in the state. Both of these provisions are confined by plain language to the state laws as they then were.

"The Crimes Act, as it is usually called, of 1790, sec. 29, makes some further regulations, which it is not necessary here to specify, in relation to the proceedings and right of peremptory challenge in criminal cases before the jury are impanelled.

"But neither of these acts make any express provision concerning the mode of conducting the trial after the jury are sworn. They do not prescribe any rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined. Yet, as the courts of the United States were then organized, and clothed with jurisdiction in criminal cases, it is obvious that some certain and established rule upon this subject was necessary to enable the courts to administer the criminal jurisprudence of the United States. And it is equally obvious that it must have been the intention of Congress to refer them to some known and established rule, which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous. This is necessarily to be implied from what these acts of Congress omit, as well as from what they contain.

"But this could not be the common law as it existed at the time of the emigration of the colonists, for the Constitution had carefully abro-

gated one of its most important provisions in relation to testimony which the accused might offer. It could not be the rule which at that time prevailed in England, for England was then a foreign country, and her laws foreign laws. And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress, was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts. And this view of the subject is confirmed by the provisions in the act of 1789, which refers its courts and officers to the laws of the respective states for the qualifications of jurors and the mode of selecting them. And as the courts of the United States were in these respects to be governed by the laws of the several states, it would seem necessarily to follow that the same principles were to prevail throughout the trial: and that they were to be governed in like manner, in the ulterior proceedings after the jury was sworn, where there was no law of Congress to the contrary.

"The courts of the United States have uniformly acted upon this construction of these Acts of Congress, and it has thus been sanctioned by a practice of sixty years. They refer undoubtedly to English works and English decisions. For the law of evidence in this country, like our other laws, being founded upon the ancient common law of England, the decisions of its courts show what is our own law upon the subject where it has not been changed by statute or usage. But the rules of evidence in criminal cases, are the rules which were in force in the respective States when the Judiciary Act of 1789 was passed. Congress may certainly change it whenever they think proper, within the limits prescribed by the Constitution. But no law of a state, made since 1789, can affect the mode of proceeding or the rules of evidence in criminal cases: and the testimony of Clements was therefore properly rejected, and furnishes no ground for a new trial."<sup>111</sup>

### *Search and Seizure*

Congress, in the Espionage Act of 1917,<sup>112</sup> essayed to unify the procedure in respect to search and seizure. The expression, "unreasonable searches and seizures," in the Fourth Amendment,

had been a fruitful source of litigation. Title XI of the Act of 1917 at least specifies what must be done and what not done about obtaining and serving a search warrant. It must not be served at night unless the officer is so authorized by its terms. The officer must leave a receipt and must file a return showing what was taken. Interested parties may controvert before a magistrate allegations upon which the warrant was issued. "Probable cause" must be shown, but "probable" is as much debatable as "unreasonable" and specification did not close the door to litigation.

Prohibition, which came later, added to the uncertainties. It has been said of the period from 1920 to 1933 that

"There were in that brief period an enormously larger number of cases on the subject than there were in the entire previous history of the United States. The result of the Prohibition cases has been to make the law governing the guaranty about as muddled as could be, which was probably inevitable."<sup>113</sup>

The emphasis in present legislation is, of course, on the apprehension and punishment of the criminal, and while that attitude dominates it is vain to expect that any attempt will be made to obtain from Congress the needed legislation to regulate the issuance of warrants. Until the legislation is enacted, invocation of the constitutional guaranty must find support in the reported decisions of the courts, an unsatisfactory situation in view of the state of the law.

#### *Alternate Jurors*

While, as will appear, it has been held permissible, with the assent of the accused, to proceed with a trial with less than twelve jurors, the present practice, where there is prospect of a protracted trial, is to swear in two additional jurors. In a letter to the chairman of the House Judiciary Committee, on March 16, 1932,

Attorney General Mitchell wrote in explanation of the bill then under consideration:<sup>114</sup>

"The purpose of this measure is to prevent a mistrial of cases wherein a juror dies or becomes so ill as to be unable to continue the performance of his duties. The expense of a protracted trial, when it is interrupted in this way, is very great. The adjournments require a large amount of extra witness fees and extra mileage, and often result in a complete failure of the case. Many of the states now have such a law, and I know of no good reason why there should not be Federal legislation on the subject."

Under the enactment, in cases that are certain to take weeks to try, many of them involving intricate research and elaborate accounting, the court will, at its discretion, direct that one or two alternate jurors be selected and sworn, to hear the testimony and at need replace a regular juror who has become ill or disabled during the trial.

### *Procedure After Verdict*

An act giving the Supreme Court authority to prescribe rules of practice and procedure with respect to criminal cases after verdict was approved June 24, 1933.<sup>115</sup> By May 1934, Chief Justice Hughes was able to inform the American Law Institute that the work had been done,<sup>116</sup> and that "the spectacle of persons convicted of crime at large on bail pending unnecessary delays in appeal" no longer need bring "the process of the court into public contempt," since useless forms had been abolished, delays had been shortened, and the parties were being given their hearing almost immediately after the appeal was taken.

### *Witnesses in Foreign Countries*

Provisions for requiring the attendance, at a criminal trial, of a witness, being a citizen of the United States or domiciled therein,

who is beyond the jurisdiction of the United States, were enacted in 1926.<sup>117</sup> It was made the duty of any consul to serve subpoena or other orders or decrees personally upon the witness, to proffer the necessary expense money and fees, and to make the return required in the process. Seizure of property of a recusing witness, and further penalty for contempt, are also specified. This legislation was held valid in the *Blackmer* case,<sup>118</sup> which had to do with prosecution over national oil-reserve leases.

### *Writings and Records Made in Regular Course of Business*

By a statute which became effective June 20, 1936 (Tit. 28 U.S.C.A., § 695; Act of June 20, 1936, c. 640, § 1; 49 Stat., 1562), books and records are admissible upon proof that the same were kept in the regular course of business. The purpose of the statute is to harmonize the rules for the admission of documentary evidence in the several circuits and to avoid the cumbersome and circuitous procedure necessary in some circuits to permit the admissibility of corporate records, the nature of which precludes any positive identification by persons making the entries therein.

### *Foreign Documents*

By the same statute (Tit. 28 U.S.C.A., §§ 695a, 695b, 695c, 695d, and 695e; Act of June 20, 1936, c. 640, §§ 2, 3, 4, 5, and 6; 49 Stat., 1562, 1563) provision is made for the taking of testimony in criminal cases with respect to foreign documents in a foreign country, upon oral or written interrogatories pursuant to a commission issued to a consular officer of the United States upon application of either the United States or the accused and without the presence of the accused, and which testimony is to be used in the trial.

It is still to be determined whether or not the use of documents

obtained in this fashion offends against the purposes of the confrontation rule prescribed by the Constitution, Amendment VI. A similar question is probably implicit in the use of writings and records made in the regular course of business (see last preceding topic).

### *The Defendant as a Witness*

One of the purposes of the Fifth Amendment was to ensure to an accused that he shall not "be compelled in any criminal case to be a witness against himself." This was a rule of the common law, but its corollary, in practice, was that he was incompetent to testify in his own behalf. A witness was supposed to be disinterested, and one accused had a very definite interest. When it was seen that the testimony of the accused might be essential to a right view of the facts, and should therefore be available to the jury, difficulties were encountered. Their nature was admirably presented in the famous case of *Ruloff v. The People*,<sup>119</sup>

"By statute (ch. 678 of the Laws of 1869) persons upon trial for crime may, at their own request, but not otherwise, be deemed competent witnesses. The act may be regarded as of doubtful propriety, and many regard it as unwise, and as subjecting a person on trial to a severe if not cruel test. If sworn, his testimony will be treated as of but little value, will be subjected to those tests which detract from the weight of evidence given under peculiar inducements to pervert the truth when the truth would be unfavorable. . . . The legislature foresaw some of the evils and dangers that might result from the passage of this act, and did what could be done to prevent them by enacting that the neglect or refusal of the accused to testify should not create a presumption against him."

Nevertheless, it was so often obvious that the testimony of the accused should be admitted in the interest of learning the truth that gradually, after 1864, when the competency of the accused



as a witness was declared in Maine, the ancient objection on the ground of interest was broken down. The law of March 16, 1878,<sup>120</sup> made definite the competency of the accused in United States courts.

The language of the statute, conserved in the Judicial Code of 1911,<sup>121</sup> is:

"That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

#### *Direct Appeal by Government to the Supreme Court*

Provision was made in the Criminal Appeals Act of 1907<sup>122</sup> that, if a demurrer or a motion to quash an indictment is sustained, when a federal statute is construed or its validity is denied, the government may bring the matter of its construction and validity directly to the Supreme Court.

The nature of the review permissible on such an appeal has recently been examined by the Supreme Court in *United States v. Curtiss Wright Export Corporation et al.* [57 Sup. Ct. 216, 225-227 (1936)].

#### *The Grand Jury and the Statute of Limitations*

By an act of May 10, 1934,<sup>123</sup> if an indictment is found defective, or insufficient for any cause, before the period fixed by the statute of limitations has expired, and such period will expire before the end of the next regular term of the court to which such indictment was returned, a new indictment may be returned not later

than the end of the next succeeding term, regular or special, of such court during which a grand jury shall be in session. The plea of the statute of limitations shall not prevail against the new indictment.

By another act, passed in 1934,<sup>124</sup> it is made the duty of the foreman of each grand jury to keep a record of the number of grand jurors concurring in the finding of an indictment, and to file such record with the clerk of the court at the time the indictment is returned. Such record is not to be made public except on order of the court.

#### *Effect of Repeal of Statutes on Existing Liability*

Section 25 of the Crimes Act of 1825 provided that "all acts and parts of acts inconsistent with the provisions of this act, shall be, and the same are hereby, repealed: *Provided, nevertheless*, That all such acts, and parts of acts, shall be, and remain in full force for the punishment of all offences committed before the passing of this act." There was no corresponding provision for repeal in the first Crimes Act, that of 1790. Neither was there such provision in numerous other statutes, either at the time of enactment or at the time of repeal. One such act, prohibiting intercourse with certain ports on the island of Santo Domingo, was passed in 1806. It expired at a time when an appeal had been taken by one Yeaton, and the Supreme Court held that "a sentence of condemnation cannot be pronounced on account of a forfeiture which accrued under a law not in force at the time of pronouncing such sentence, unless by some statutory provision the right to enforce such forfeiture be preserved."<sup>125</sup> Again, in 1871, Congress having passed a statute repugnant to an earlier one, it was held in *United States v. Tynen*<sup>126</sup> that an indictment under an earlier law must be dismissed.

Only one week after the *Tynen* case had been submitted, and

six weeks before the decision was given, Congress enacted that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."<sup>127</sup> This language was retained in the Revisions of 1873, 1878, and 1909, and now constitutes Title 1, Section 29, of the United States Code.

Similarly, when the provisions of Section 3 of the Act of 1825 (adopting the state laws for offenses committed in places ceded by the states to the federal government) were renewed in 1866, it was provided that "no subsequent repeal of any such State law shall affect any prosecution for such offence in any of the courts of the United States."<sup>128</sup>

In regard to such crimes themselves, since it would be an unwarranted delegation of the power of Congress to adopt state laws of future enactment, the desired result is accomplished through the Federal Criminal Conformity Act, brought down to date from time to time to conform to changes in the state laws since the last previous enactment.<sup>129</sup>

#### LEGISLATION BY JUDICIAL DECISION

There are instances in which the Supreme Court may be said to have legislated by decision.

##### *Waiver of Trial by Jury*

In 1903, in *Schick v. United States*,<sup>130</sup> it was held that a defendant charged with a petty offense might submit the issues to a court without a jury. The case arose over an infraction of the oleomargarine law, for which the fine was fifty dollars. The Court held that in such cases jury trial might be waived by the

defendant, and that "the mandate that 'trial of all crimes, except in cases of impeachment, shall be by jury' does not include such petty offenses (as the one here involved) and there is no Congressional legislation or rule of public policy requiring a jury in such cases."

The emphasis placed by the Court, in *Schick v. United States*, upon the view that jury trial is to be regarded primarily for the protection of the accused left room for the inference that, on parity of reasoning, waiver of jury trial might be permitted in other cases besides those for a petty offense. In *Patton v. United States*<sup>131</sup> that is what developed. The defendants were indicted for conspiring to bribe a government agent, a crime punishable by imprisonment for a term of years. A juror became ill, and, with the consent of the defendants, the trial proceeded with eleven in the jury box. A verdict of guilty was rendered, and the case went up, on certificate by the circuit court of appeals, for the opinion of the Supreme Court on the question whether or not the constitutional right to a jury of twelve persons might be waived by one on trial for a crime. The question was answered in the affirmative. The constitutional provision was held not jurisdictional but as conferring a right upon the accused which he might forego at his option.

### *Husband and Wife as Witnesses*

In 1932 a bill was presented, but not enacted, to make competent, but not compellable, the testimony of a husband or wife in a trial in which the other is defendant. But a decision, making legislation unnecessary, was rendered in 1933 in *Funk v. United States*.<sup>132</sup> It was there held that

"the Federal courts may, in the absence of Congressional legislation on the subject, decline to enforce an ancient rule of the common law where conditions have fundamentally altered, and may declare and

effectuate a rule in the light of such altered conditions without regard to what has previously been decided and practised."

In the actual case the decision was that a wife might give testimony favorable to her husband. The argument turned upon the maxim that no rule could survive the reason upon which it was founded, and that since the husband, by the Act of 1878, is a competent witness, the ancient principle of unity in the relation of husband and wife is not invaded when the wife's testimony is also taken.

As has been observed, the holding in the *Funk* case was that the wife is a competent witness for her husband. Is she a competent witness against him? In the annual report of the attorney general for the fiscal year 1936, addressed to Congress, under date of January 6, 1937, the attorney general lists a number of bills "sponsored by the Department to eliminate archaic technicalities and to make possible greater expedition in the disposition of criminal cases, without depriving the defendants of any rights to which they should be entitled," etc. Among these bills, which were passed by the Senate in the Seventy-Fourth Congress but not acted on by the House of Representatives, is the following:

"To provide that one spouse may be a competent witness against the other in criminal cases."

In *Yoder v. United States* [80 F. (2d) 665], the Circuit Court of Appeals, Tenth Circuit, without awaiting the authority of the requested legislation, held that a wife is competent as a witness when called by the prosecution. A discussion of the decision will be found in 35 *Michigan Law Review*, page 329.

While the changes in procedure that we have reviewed seem to lack coherency of plan, scrutiny of them reveals an attempt to conform federal criminal practice to the present demand that

the criminal suspect be deprived, to the fullest possible extent permissible under constitutional guarantees, of every objection that he has heretofore been allowed to interpose between the charge of crime and conviction for its commission.

The list of the bills recommended to the last Congress by the attorney general and passed by the Senate furnishes proof of this purpose. The proposed bills are as follows:

To permit the defendant to waive indictment by grand jury and to consent to prosecution by information

To require a defendant who proposes to rely on the defense of alibi to give to the prosecution notice of such defense before the trial

To permit comment on a defendant's failure to testify

To abolish appeals in habeas corpus proceedings instituted to test the right of the government to remove a defendant to the district in which he has been indicted from the district in which he was arrested

To permit the taking of depositions in criminal cases, subject to safeguarding the defendant's rights to be confronted with the witnesses against him

To provide that one spouse may be a competent witness against the other spouse in criminal cases

There has been a change in recent years in the attitude of the law toward the criminal suspect, and rules which were adopted to protect the innocent from punishment for crimes they had not committed are now being drastically abolished because they are regarded as obstacles to the successful punishment of crime.

In attempting to accomplish this result in the field of federal crime, the government has certainly manifested great ingenuity in marking out for extinction the principal procedural difficulties.

## CONCLUSION

*Congress, the States, and the General Welfare*

From the review of the circumstances in which the federal criminal law has been formulated, added to, and conformed to judicial decision, it would appear that there are three main categories into which the punitive application of federal powers can be divided. First are the provisions integral to the enforcement of laws definitely and unmistakably contingent, for strictly federal purposes, upon the federal enumerated powers. Second are the specifications of offenses, involving interference with or misuse of agencies subject to federal control, supplementing state authority and in part conducing to an overflow upon state jurisdiction. Third is the adaptation of federal powers, singly or in combination, to the solution of some problem affecting the general welfare.

Given a protracted continuance of conditions inimical to the general welfare, and which the states are either unable to control or unconcerned about controlling, there is certainty of pressure being exerted upon Congress to deal with the situation by resort to powers at its disposal. The commerce power, the treaty power, the power available under postal regulations, and the taxing power can be invoked.

Especially has it been made clear that Congress considers itself free to utilize the taxing power for purposes other than revenue, and to apply it as a mere tour de force, as when by taxation of oleomargarine it complied with the wishes of those who made butter, or when, by adding to previous enactments for the control of narcotics some provisions for collection of internal-revenue license fees in the Harrison Act, it took the narcotic situation into federal administrative supervision and control. On present indications, there is a disposition to project the taxing power into

other fields. Every such application of the power will produce new classifications of acts that are "unlawful" and add to the list of offenses under federal criminal law.

As to many crimes presently listed, what is to be perceived is that at the time they were specified by enactment the choice was between federal control and no control, since state jurisdiction stopped, as criminals did not, at state boundaries. What we are to expect is that, unless the "no-control" feature is eliminated by the states in some way, making control by themselves possible, the experience of the past half century will merge into the experience of the next half century. Past emphasis on the availability of the commerce power may, for example, have for its successor future emphasis on the availability of the taxing power.

The choice open to the states is between being reconciled to the change, which will be progressive, and exerting themselves to hold what attributes of government they have and to regain what they have parted with. Nothing is more clearly evident than that, if the people living in the states are indisposed to, or incapable of, that exertion, the people of the United States will urge Congress to demonstrate still further the elastic quality inherent in its powers. Protest against encroachment will not preserve intact the defenses of the "indestructible states." It remains to be seen whether coöperation among themselves can or will be developed to the extent of being productive of better results.

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NOTES

<sup>1</sup> Title 18, UNITED STATES CODE. This historical review does not include legislation relating to offenses occurring in the District of Columbia, the territories, and Indian reservations. Such enactments are local in character and do not in a proper sense pertain to the development of federal criminal law.

<sup>2</sup> Act of April 30, 1790, c. 9, 1 STAT. 112, 18 U. S. C. A. §§ 1, 3 (1926).

<sup>3</sup> Act of March 3, 1825, c. 65, 4 STAT. 115, 18 U. S. C. A. §§ 464, 465, 468, 452, 454, 457, 28 U. S. C. A. § 102 (1926).

<sup>4</sup> Act of March 4, 1909, c. 321, 35 STAT. 1143, 18 U. S. C. A. §§ 452-459 (1926).



- <sup>5</sup> Art. I, § 8 (18).
- <sup>6</sup> FORD, PAMPHLETS ON THE CONSTITUTION (1888) 331.
- <sup>7</sup> *Id.* at 359.
- <sup>8</sup> Art. 3, § 3 (1).
- <sup>9</sup> Art. I, § 8 (6).
- <sup>10</sup> Art. I, § 8 (10).
- <sup>11</sup> Art. 3, § 3 (2).
- <sup>12</sup> *Ibid.*
- <sup>13</sup> Art. 3, § 2 (3).
- <sup>14</sup> Art. I, § 9 (2).
- <sup>15</sup> Art. I, § 9 (3).
- <sup>16</sup> Art. I, § 8.
- <sup>17</sup> Act of June 6, 1934, c. 293, 48 STAT. 909, 18 U. S. C. A. 420 (Supp. 1935).
- <sup>18</sup> Art. I, § 8 (9).
- <sup>19</sup> Act of Sept. 24, 1789, c. 20, 1 STAT. 73, at 76, 28 U. S. C. A. §§ 1, 10, 15, 141, 147, 148, 160, 166, 167, 175, 176, 322, 323 (1926).
- <sup>20</sup> Act of April 30 1790, c. 9, 1 STAT. 112, 18 U. S. C. A. §§ 1, 3 (1926).
- <sup>21</sup> Art. I, § 8 (17).
- <sup>22</sup> United States v. McGill, 4 U. S. (4 Dall.) 429 (1806).
- <sup>23</sup> 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922) 162.
- <sup>24</sup> *Id.* at 163, 164.
- <sup>25</sup> 2 U. S. (2 Dall.) 384 (1798).
- <sup>26</sup> Chisholm v. Georgia, 2 U. S. (2 Dall.) 419 (1792).
- <sup>27</sup> United States v. Coolidge, 14 U. S. (1 Wheat.) 415 (1816).
- <sup>28</sup> Martin v. Hunter's Lessee, 14 U. S. (1 Wheat.) 304 (1816).
- <sup>29</sup> 11 U. S. (7 Cranch) 32 (1812).
- <sup>30</sup> 14 U. S. (1 Wheat.) 415 (1816).
- <sup>31</sup> United States v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764 (1892). The general rule that there are no common-law offenses against the United States does not apply to the District of Columbia. [Tyner v. United States (1904) 23 D. C. App. 324, 358.]
- <sup>32</sup> WARREN, *op. cit. supra* note 23, at 436-440.
- <sup>33</sup> *Ibid.*
- <sup>34</sup> Martin v. Hunter's Lessee, 14 U. S. (1 Wheat.) 304 (1816).
- <sup>35</sup> WARREN, *op. cit. supra* note 23, at 441.
- <sup>36</sup> 16 U. S. (3 Wheat.) 336 (1818).
- <sup>37</sup> 18 U. S. (5 Wheat.) 76 (1820).
- <sup>38</sup> Act of March 3, 1825, c. 65, 4 STAT. 115, 18 U. S. C. A. §§ 464, 465, 468, 453, 454, 457; 28 U. S. C. A. § 102 (1926).
- <sup>39</sup> United States v. Davis, Fed. Cas. No. 14,930, 5 Mason 356 (C. C. D. Mass. 1829).
- <sup>40</sup> Act of March 4, 1909, c. 321, 35 STAT. 1143, 18 U. S. C. A. § 452 (1926).
- <sup>41</sup> Act of March 4, 1909, c. 321, 35 STAT. 1143, 18 U. S. C. A. § 453 (1926).
- <sup>42</sup> Act of March 4, 1909, c. 321, 35 STAT. 1143, 18 U. S. C. A. § 457 (1926).
- <sup>43</sup> Act of March 4, 1909, c. 321, 35 STAT. 1145, 18 U. S. C. A. § 481 (1926).
- <sup>44</sup> Act of March 3, 1825, c. 65, 4 STAT. 115 at 122, 123, 18 U. S. C. A. § 26 (1926).
- <sup>45</sup> Act of March 4, 1909, c. 321, 35 STAT. 1159, 18 U. S. C. A. § 25 (1926).
- <sup>46</sup> Title 71.
- <sup>47</sup> Title 70, c. 2.

- <sup>48</sup> *Id.*, c. 7.  
<sup>49</sup> Act of May 4, 1870, c. 72, 16 STAT. 96.  
<sup>50</sup> REV. STAT. (1878) 1035.  
<sup>51</sup> *Ibid.*  
<sup>52</sup> Act of March 4, 1909, c. 321, 35 STAT. 1143, 18 U. S. C. A. §§ 452-459 (1926).  
<sup>53</sup> 60th Congress, Calendar No. 9, Senate Report 10, Part 1 (1909).  
<sup>54</sup> First Supplement to end of Session of 1891; second to end of Session of 1901.  
<sup>55</sup> 30 STAT. 58.  
<sup>56</sup> Act of March 3, 1899, 30 STAT. 1116.  
<sup>57</sup> Act of March 3, 1901, 31 STAT. 1181.  
<sup>58</sup> Act of March 3, 1903, 33 STAT. 1285.  
<sup>59</sup> 60th Congress, Senate Report 10, Part 1 (1909).  
<sup>60</sup> Act of March 4, 1909, c. 321, 35 STAT. 1143, 18 U. S. C. A. §§ 452-459 (1926).  
<sup>61</sup> *Ibid.*, § 336, 35 STAT. 1152, 18 U. S. C. A. § 553 (1926).  
<sup>62</sup> THE FEDERALIST (1870) no. 44.  
<sup>63</sup> Act of Feb. 4, 1887, c. 104, 24 STAT. 379, 49 U. S. C. A. §§ 1-2 (1926).  
<sup>64</sup> Act of July 3, 1866, c. 162, 14 STAT. 81, 18 U. S. C. A. §§ 382-386 (1926).  
<sup>65</sup> Act of June 8, 1872, c. 335, 17 STAT. 300, 18 U. S. C. A. § 340 (1926).  
<sup>66</sup> Act of March 3, 1895, c. 191, 28 STAT. 963, 18 U. S. C. A. § 387 (1926).  
<sup>67</sup> Act of Aug. 8, 1890, c. 728, 26 STAT. 313, 27 U. S. C. A. § 121 (1930).  
<sup>68</sup> Act of March 1, 1913, c. 90, 37 STAT. 699, 27 U. S. C. A. § 122 (1930).  
<sup>69</sup> Act of March 3, 1917, c. 162, § 5, 39 STAT. 1202, 27 U. S. C. A. § 123 (1930).  
<sup>70</sup> Act of June 25, 1910, c. 395, 36 STAT. 825, 18 U. S. C. A. §§ 397-404 (1926).  
<sup>71</sup> *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281 (1913).  
<sup>72</sup> Act of March 3, 1875, c. 141, 18 STAT. 477, 8 U. S. C. A. §§ 336, 338-339 (1926).  
<sup>73</sup> Act of March 3, 1903, c. 1012, 32 STAT. 1221, 40 U. S. C. A. § 191 (1926).  
<sup>74</sup> Act of Feb. 20, 1907, c. 1134, 34 STAT. 898, repealed by act of Feb. 5, 1917, c. 29, 39 STAT. 897, 8 U. S. C. A. § 178 (1926).  
<sup>75</sup> *United States v. Keller*, 213 U. S. 138, 29 Sup. Ct. 470 (1909).  
<sup>76</sup> 35 STAT. 1979.  
<sup>77</sup> *Supra* note 68.  
<sup>78</sup> 242 U. S. 471, 37 Sup. Ct. 192 (1917).  
<sup>79</sup> Act of July 31, 1912, c. 263, 37 STAT. 240, 18 U. S. C. A. § 405 (1926).  
<sup>80</sup> Act of Feb. 15, 1893, c. 114, 27 STAT. 349, 42 U. S. C. A. §§ 81, 98 (1926).  
<sup>81</sup> *McDermott v. Wisconsin*, 228 U. S. 115, 33 Sup. Ct. 431 (1913).  
<sup>82</sup> Act of Aug. 30, 1890, c. 839, 26 STAT. 415, 21 U. S. C. A. § 18 (1926).  
<sup>83</sup> Act of June 30, 1906, c. 3915, 34 STAT. 768, 21 U. S. C. A. § 1 (1926).  
<sup>84</sup> *Munn v. Illinois*, 94 U. S. (4 Otto) 113 (1877).  
<sup>85</sup> Act of Jan. 17, 1914, c. 9, 38 STAT. 275, 21 U. S. C. A. § 171 (1926).  
<sup>86</sup> Act of Feb. 8, 1909, c. 100, 35 STAT. 614, 21 U. S. C. A. §§ 171-177 (1926).  
<sup>87</sup> Ratified by Senate Oct. 18, 1913; by President, Oct. 27, 1913.  
<sup>88</sup> *Brolan v. United States*, 236 U. S. 216, 35 Sup. Ct. 285 (1915).  
<sup>89</sup> *United States v. Doremus*, 249 U. S. 86, 39 Sup. Ct. 214 (1919).  
<sup>90</sup> Act of June 26, 1934, c. 474, 48 STAT. 1236, 26 U. S. C. A. § 861q (Supp. 1934).  
<sup>91</sup> *Stockton v. United States*, 205 Fed. 462 (C.C.A. 7th, 1913).  
<sup>92</sup> *Badders v. United States*, 240 U. S. 391, 36 Sup. Ct. 367 (1916).  
<sup>93</sup> Act of July 2, 1890, c. 647, 26 STAT. 209, 15 U. S. C. A. §§ 1-4 (1926).

- <sup>94</sup> Act of Oct. 15, 1914, c. 323, 38 STAT. 730, 15 U. S. C. A. §§ 12, 13, 44; 28 U. S. C. A. § 390a; 29 U. S. C. A. 53 (1926).
- <sup>95</sup> Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502 (1911).
- <sup>96</sup> Act of October 29, 1919, c. 89, 41 STAT. 324, 18 U. S. C. A. § 408 (1926).
- <sup>97</sup> Act of May 22, 1934, c. 246, 48 STAT. 794, 18 U. S. C. A. §§ 413-419 (Supp. 1934).
- <sup>98</sup> Act of June 22, 1932, c. 271, 47 STAT. 326, 18 U. S. C. A. § 408a (Supp. 1934).
- <sup>99</sup> Act of May 18, 1934, c. 300, 48 STAT. 781, 18 U. S. C. A. § 408d (Supp. 1934).
- <sup>100</sup> Act of May 18, 1934, c. 302, 48 STAT. 782, 18 U. S. C. A. § 408e (Supp. 1934).
- <sup>101</sup> Rep. Att'y Gen. June 30, 1936.
- <sup>102</sup> H. Rep. No. 1137, 73d Congress, 2d Sess. (1934).
- <sup>103</sup> Act of June 6, 1934, c. 406, 48 STAT. 909, 18 U. S. C. A. § 420 (Supp. 1934).
- <sup>104</sup> Massachusetts v. Klaus, 145 App. Div. 798, 130 N. Y. Supp. 713 (1911).
- <sup>105</sup> S. B. 428, Sess. 1936.
- <sup>106</sup> S. B. 426, Sess. 1936.
- <sup>107</sup> S. B. 427, Sess. 1936.
- <sup>108</sup> 1 STAT. 93, c. 21, 28 U. S. C. A. § 723 (1926).
- <sup>109</sup> United States v. Reid, 53 U. S. (12 How.) 361 (1852).
- <sup>110</sup> 12 How. 363.
- <sup>111</sup> 12 How. 365-366.
- <sup>112</sup> Act of June 15, 1917, c. 30, Title XI, § 1 *et seq.*, 40 STAT. 228, 18 U. S. C. A. §§ 611-633.
- <sup>113</sup> 13 ENCYC. SOC. SCI. (1934) 639.
- <sup>114</sup> Act of June 29, 1932, c. 309, 47 STAT. 380, 28 U. S. C. A. § 417a (Supp. 1934).
- <sup>115</sup> Act of Feb. 24, 1933, c. 119, 47 STAT. 904, 28 U. S. C. A. § 723a. (Supp. 1934).
- <sup>116</sup> (1934) 20 A. B. A. J. 335.
- <sup>117</sup> Act of July 3, 1926, c. 762, 44 STAT. 835, 28 U. S. C. A. § 711 (1-4) (Supp. 1929).
- <sup>118</sup> 284 U. S. 421, 52 Sup. Ct. 252 (1932).
- <sup>119</sup> 45 N. Y. 217, 221 (1871).
- <sup>120</sup> 20 STAT. 30, c. 37, 28 U. S. C. A. § 632 (1928).
- <sup>121</sup> Act of March 3, 1911, c. 231, 36 STAT. 1087, 28 U. S. C. A. § 632 (1928).
- <sup>122</sup> Act of March 2, 1907, c. 2564, 34 STAT. 1246, 18 U. S. C. A. § 682 (1926).
- <sup>123</sup> Act of May 10, 1934, c. 217, 48 STAT. 772, 18 U. S. C. A. § 587 (Supp. 934).
- <sup>124</sup> Act of April 30, 1934, c. 170, 48 STAT. 649, 18 U. S. C. A. § 554a (Supp. 1934).
- <sup>125</sup> Yeaton v. United States, 9 U. S. (5 Cranch) 281 (1809).
- <sup>126</sup> 78 U. S. (11 Wall.) 88 (1871).
- <sup>127</sup> Act of Feb. 25, 1871, c. 71, 16 STAT. 432; United States v. Curtiss Wright Export Corporation, 57 Sup. Ct. 216, 225-227 (1936).
- <sup>128</sup> Act of April 15, 1866, c. 24, 14 STAT. 12, at 13.
- <sup>129</sup> Sec. 3 of the Act of March 3, 1825; sec. 2 of the Act of April 5, 1866; sec. 2 of the Act of July 7, 1898; sec. 468 of Title 18, *as am'd* by Act of June 15, 1933; c. 85; and the Act of June 20, 1935.
- <sup>130</sup> 195 U. S. 65, 24 Sup. Ct. 826 (1904).
- <sup>131</sup> 281 U. S. 276, 50 Sup. Ct. 263 (1930).
- <sup>132</sup> 290 U. S. 371, 54 Sup. Ct. 212 (1933).

# JURY-TRIAL RULES OF EVIDENCE IN THE NEXT CENTURY

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## I

**D**URING the century since the founding of New York University, what has happened to the jury-trial rules of evidence? Have they progressed or have they degenerated?

Both.

They have progressed, in that they have become rationalized—in theory, at least. Justice Holmes has defined rationalization: “A body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves and the grounds for desiring that end are stated or are ready to be stated in words.”<sup>1</sup>

The law of evidence, when New York University came into existence, was a body of traditional rules, originally developed from practical reasons, but later handed along as mere rules of thumb. Beginning with the theorizations of Evans and Bentham, a century ago, and progressing through the practical treatises of Best and Stephen, the rationalization (in Justice Holmes’s sense) has progressed notably.

On the other hand, the practice of the rules has steadily degenerated—at least in the United States. The employment of the rules no longer is marked by referring “articulately and definitely to the end” which they subserve, *viz.*, the ascertainment of the truth. They have swelled into a mass of details that have no relation to that end. They are used as tactical weapons for unrelated ends. They are incidentally fought over with irrelevant snarling and yapping—as if two packs of eager hounds on their

way to a hunt were allowed by their masters to spend the morning in a public dogfight, and thus to spoil the purposes of the hunt. Their mass has become so voluminous and unmanageable that only a few judges and practitioners are able to master them and to use them correctly.

Thus their story of practice, during this past century, has been one of degeneration. Professor Sunderland, commenting recently on the proposal to formulate the rules of evidence in the federal courts, has thus pronounced sentence: "The subject of evidence . . . probably contributes more than any other part of procedure to the delay and expense of litigation. . . . It gives the public an uneasy feeling of mystery and unreality in the administration of justice. . . . There seems to be no indication that it [simplification] will be brought about by judicial decisions."<sup>2</sup>

In short, the degeneration is now continuous, with worse in sight.

## II

What can be done about it? Can the causes of it be stopped? They cannot be cured by any direct measures, for the causes are external to the law of evidence. They are due to other and larger conditions—the misguided constitutional notion that a jury's verdict is sacrosanct; the separation of the appellate tribunal on high, controlling the trial bench only on rules of law and not on facts; the partisan political selection of judges, and their brief terms of office, resulting in lack of respect by the bar for the rulings of the trial bench; the "hoypolloyization" of the bar, resulting in misuse of evidence rules by crude or by unscrupulous upstarts and (last but not least) in bad manners, worthy only of a cockpit or a monkey house and not of the courtrooms of a Mansfield and a Marshall.

While these conditions prevail uncured, the jury-trial rules of

evidence cannot be radically reformed. One might as well expect a modern hospital or a chemical laboratory to be properly used when donated to a tribe of African bushmen.

### III

What, then, is the solution? Some persons have proposed that all the trial-rules of evidence be abolished. In this paper no arguments against that solution need be offered. Enough to say that the ascertainment of truth in litigation cannot be efficiently conducted on a large scale without some rules based on experience of human nature in litigation.

To be sure, the administrative tribunals—and there are scores of them—do endeavor to get along without the jury-trial rules. Let them continue to do so. After a period of observation, we shall be able to build up some conclusions out of their experience.

But in the judicial tribunals, can no renovation be done?

### IV

My proposal is this: Jury trial, when properly reformed, is a sound and indispensable institution for the decision of controversies. But it is not invariably necessary or desirable for all kinds of litigation. Trial by a juryless judge is just as efficient, and sometimes more desirable, than jury trial—depending on the kind of issue and upon the personnel of bench and bar at a particular time and place. Trial by a juryless judge is, indeed, increasingly used in some quarters today.

Many of the reasons on which evidence rules depend cease to apply where the lay jury does not have to be considered. What does still have to be considered is the human nature of judges, witnesses, parties, and counsel. So let us compose a code of fundamental principles of evidence, based on experience of human nature already embodied in the present jury-trial rules.

Let us extract these fundamentals from the present mass of details, reducing that mass to its minimum of fundamentals. Let us adopt this code of principles and offer it to the juryless judge for his guidance. And then, after a period of experience, let us see whether or not it answers the purpose.

If it does answer the purpose measurably, then perhaps bar and bench would find themselves willing to use it in jury trials—always assuming that by that time the degenerative conditions (above mentioned) have been removed or improved.

Below follows a summary of principles of evidence-admissibility for judges trying without a jury. Let this summary be debated. Let others try their hands at some rival formulations. Out of all the discussion, let some model summary emerge. And then let the trial judges adopt and use it.

Only one word of warning. Old Solon, when he drew a code for the Athenians at their request (and then prudently left Athens for parts unknown), was asked by a critical friend, "Was this the *best* code that you could devise?" "Yes," he replied, "that is, *the best that they could endure*."

In our existing conditions, it would be impracticable to pass directly from the present bulky mass and mess of details to the ideal, simple body of abstractions. The transition requires a compromise. The summary offered below is intended as such.<sup>3</sup>

## V

### SUMMARY OF EVIDENCE PRINCIPLES FOR A NONJURY TRIBUNAL

[N.B. This summary is not meant for use in simple controversies, where the taking of evidence consists mainly in disentangling and recording the undisputed facts. It is meant for use in complex and controverted cases.

This compendium is composed in the style of directions addressed

to the investigator, for guidance in his mental processes about the evidence, and not in the style of a code, *i.e.*, of propositions of law.

No reasons for the principles are here given. For these, refer to the regular textbooks of evidence.

This formulation is a first attempt, and can doubtless be improved upon.]

## SECTION 1

### PRINCIPLES OF PROCEDURE

A. *Fundamentals.* The fundamentals for a fair and thorough trial of controverted facts are these:

1. Every party is entitled to be notified, in ample season before the tribunal sits, of the issues to be tried, so that he may have adequate opportunity to seek and adduce his evidence.
2. Every party is entitled to legal process, or other suitable measures, for obtaining the witnesses, documents, and chattels he needs.
3. Every party is entitled to hear the evidence produced against him, so that he may be able to refute it.
4. Therefore, the tribunal must hold its hearings in the presence of both parties and their assistants and witnesses.

B. *Burden of proof.* The party who is asking the tribunal for action has two burdens of proof. This means, *first*, that if, after all evidence is in, there is doubt in the tribunal's mind on any fact in issue necessary to that party's case, the decision must be against him; and *secondly*, that that party must be the first to adduce some evidence.

However, at any time the tribunal may be satisfied regarding the second burden, and may then direct the opposite party to adduce his contrary evidence, if any, or lose the decision.

In cases where an act or a duty is excused or discharged under



the law by some specific fact, the tribunal may declare that the burdens of that fact are on the opposing party.

*Examples:* Action for the price of goods delivered; pleas, goods not up to sample, and part payment. The plaintiff has the burden of persuading the tribunal that the contract was made and duly performed; the defendant has the burden regarding payment. On the first issue, after the plaintiff has offered evidence on the sample and the delivery, the tribunal may direct the defendant to produce evidence of nonconformity to sample or the decision will be against him on that issue. After the defendant has testified to handing a check to the plaintiff in payment, the tribunal may require the plaintiff to produce evidence of its dishonor or the decision will be against him on that issue.

1. In disposing of the second burden, the tribunal may assist itself by resorting to presumptions; *i.e.*, rules based on experience of the usual course of behavior or events.

There are scores of these, too many to enumerate in this summary. Some of the most common are as follows:

- Of sanity, in testamentary and in criminal cases
- Of undue influence and fraud, in grants to a confidential adviser and in conveyances to family members
- Of consent and of capacity, in marriage
- Of negligence, in various aspects—personal injury, loss by a bailee, death by violence, damage by machinery, damage by an automobile, etc.
- Of payment, from lapse of time, etc.
- Of execution of documents, from delivery, etc.
- Of legitimacy, from birth during marriage
- Of similarity of another state's law
- And, in criminal cases, numerous other presumptions.

2. Regarding the measure of persuasion that the tribunal should have before reaching a decision on the first burden, the following principles, though vague, are all that have yet been devised:

- a. In a criminal charge, the facts in issue must be believed beyond a reasonable doubt.
- b. In a civil case, a lesser degree of belief suffices—a “preponderance of evidence” is the usual phrase. This means such belief as would justify our action in serious matters affecting our own interests.

C. *Order of evidence.* The order of producing evidence is as follows:

1. The party having the burden of proof offers all his evidence in support of his facts in issue, without interruption.
2. The opposing party offers all his evidence to the contrary.
3. The first party then offers any new evidence made necessary in order to rebut the opposing party's evidence, but nothing else.

The tribunal may at discretion vary this order of evidence.

D. *Order of testimony.* As to the testimony of each witness:

1. The party offering him interrogates on all or any facts in support of his case.
2. The opposing party then interrogates him on any relevant matter, either discrediting his testimony or supporting the opponent's case.
3. The first party then interrogates him on any new matter made necessary by the opposing party's examination, but on nothing else.

The tribunal may in discretion vary this order of examination.

## SECTION 2

DEFINITIONS AND CLASSIFICATIONS OF  
PRINCIPLES OF EVIDENCE

There are two kinds of evidence: testimonial and circumstantial. Testimonial evidence is any assertion of a person, offered to evidence the fact asserted. Circumstantial evidence is all other evidential facts; there are thousands of varieties.

A circumstantial fact is itself usually evidenced in the first instance by a testimonial assertion; *e.g.*, when a witness testifies to a street light seen by him. But sometimes the tribunal can perceive the circumstance by its own senses; *e.g.*, when a broken knife is shown in court.

A fact in issue is an alleged and disputed fact forming part of the claim or defense of a party; the law of the case determines what are the facts in issue.

The mental process of reasoning from one fact to another by evidence is "inference"; the final mental result of persuasion, as the result of one or more proposed inferences, is "proof" or "nonproof."

*Examples:* Two or more inferences may intervene in order to reach a fact in issue; as: When, on a charge of assault, the accused is arrested near-by in a hatless and panting condition, we infer first from the testimony that he was actually in that condition, and then that he had been running, and then that he had been running away from the scene of the assault, and then that he had been conscious of participation in the assault. Thus each circumstance in this chain of inference in turn becomes a fact to be proved, and thus any fact in issue may have several chains of inference leading up to it, some of them testimonial, some of them circumstantial; *e.g.*, on a charge of driving knowingly past a red traffic-light, the fact of the light being at red may rest on several inferences, testimonial and circumstantial; then the fact of its

being visible in the conditions of weather, etc., may involve other inferences; and the final fact in issue of the defendant's actually seeing but defying it may involve still additional inferences.

What general principles are there that should control the admission of the various kinds of evidence in controverted cases?

First come principles of relevancy (circumstantial and testimonial). Then come some additional principles, based on experience in trials:

- Preferential principles
- Analytic principles
- Corroborative principles
- Principle of verbal completeness
- Principle of authentication
- Principles of privilege
- Principles exempting from evidence

### SECTION 3

#### PRINCIPLES OF RELEVANCY

A. *Circumstantial evidence.* Admit no piece of evidence that is irrelevant; conversely, admit every piece of evidence that is relevant, except as directed in paragraphs one to four, below.

"Relevant" signifies "having appreciable probative value," *i.e.*, rationally tending to persuade us of the probability or possibility of some other fact in issue or relevant fact.

*Examples:* On a claim for shoes sold and delivered—plea, goods not up to sample—the fact that plaintiff had delivered to other customers shoes not up to sample might be relevant; but the fact that he paid his workmen less than union wages would be irrelevant.

In a suit for personal injury disabling the plaintiff, the fact that the hospital surgeon had wrongly treated the plaintiff's limb might be

relevant; but the fact that his wife had deserted him since the injury would be irrelevant.

Therefore, at the outset, separate and set down the two or more ultimate facts in issue; *i.e.*, alleged facts on which the merits of the case depend, under the law. Then admit any evidence that is relevant, through one or more inferences, to any fact in issue; but always require the offering party, if the relevancy is not obvious, to point out the exact inference, or chain of inferences, by which the evidence would become relevant.

- i. On grounds of *practical policy*, some kinds of evidence, having only slight relevancy, ordinarily should be excluded. These grounds are three:

- a. *Confusion of issues; i.e.*, if the evidence would merely divert the attention of the tribunal from the main issues without adding much probative value
- b. *Undue prejudice; i.e.*, if the evidence would tend unduly to arouse the tribunal's emotions for or against one of the parties, displacing logic and calm reasoning, without adding much probative value
- c. *Unfair surprise; i.e.*, if the evidence, when offered without notice beforehand, would find the opponent unprepared to refute it if false.

The following kinds of evidence should be excluded, unless exceptionally in discretion, on one or another of the foregoing grounds.

2. In criminal cases, the accused's bad *moral character* (disposition) should not be admitted to evidence that he did the act

charged, unless to rebut what he alleges is his good character. In civil cases, the moral character of either party should not be admitted evidentially unless the fact in issue involves the party's doing of an act that has a moral quality.

This principle does not exclude a party's careful or negligent disposition or habit.

*Examples:* Action by a schoolteacher against a school board for wrongful dismissal. Here the teacher's general moral character might be relevant. But in an action by the father of a pupil for beating his son, the teacher's general moral character would be irrelevant, yet the teacher's habit or his disposition of violence to the pupils would be relevant.

3. In criminal cases, even where the accused offers his good character in evidence and the prosecution is entitled to rebut this, the accused's specific bad acts are not to be admitted, though exceptionally his prior conviction for offenses like the one charged could well be admitted.

This principle, however, does not exclude his prior bad acts when they are relevant to evidence an intention (plan, design) or motive to do the act charged, or to disprove his alleged mistake or good faith or ignorance in doing the act.

*Examples:* Prosecution for murder during a robbery—waylaying with a motorcar a bank messenger. The accused's former conviction for a murder or a robbery would not be admitted but his theft of the motorcar in preparation for this robbery would be admitted.

4. In civil cases, if the party's character or skill is a part of the issue, specific instances of conduct are admissible to evidence the trait in issue.

So far as a party's physical capacity, or mental capacity, or knowledge is material or relevant, conduct or circumstances tending to evidence it is admissible.

B. *Testimonial evidence.* Admit as witness any person, regardless of race, age, sex, mental condition, moral character, or partisan relation to the cause—provided only that the person professes to be able to testify to some relevant fact that he has seen or heard; *i.e.*, with his own senses.

But, exceptionally, a person may be admitted to testify to matters, not personally seen or heard, on which, in everyday experience, we are satisfied to act without personal observation.

*Examples:* An action for negligent collision at a crossing. A bystander, coming up after the collision, may testify only to what he saw and heard at the time. But a traffic officer may testify to the hour at which traffic lights are turned on all over the city, though he has never seen all the lights; and an automobile dealer may testify to the market price of the make of the plaintiff's car, though he has not personally observed more than a few sales.

1. When the witness has thus seen or heard any relevant fact, he may further state his inferences from it; there is no prohibition against an "opinion" or "conclusion" in such cases.

*Examples:* An action for personal injury caused by a motorcar. A bystander who saw the affair may testify that he heard the screeching of the plaintiff's car brake and that "it sounded as if it was out of order"; that he saw the defendant's car approaching and that the defendant was "driving recklessly"; that "at the speed he was going, he could not have stopped before reaching the crossing."

2. However, where the subject of testimony is one on which no person is qualified to speak reliably, whether of fact or opinion, without having special experience in that subject, only a person having such experience may testify.

*Examples:* Prosecution of a druggist for selling cyanide of potassium without a license. The precise nature of the bottle impounded

should be testified to by a chemist or a physician, but any observer may testify to the label and other appearances.

3. In giving testimony, the witness may use, or describe the results of his using, any apparatus, scientific or technical, that reveals details not observable by the unaided senses, or which makes the subject of the testimony more clear or more complete to the tribunal; provided the apparatus is one accepted as reliable in the occupation using it and the witness is qualified to use it.

*Examples:* Telephones; magnified photographs of writing; microphotographs of substances analyzed; charts of localities; photographs of bullets and fingerprints; surveying instruments; radio telephones, etc.

4. The witness may refer to any memorandum or other paper to revive his recollection. If he made such a memorandum at the time of the event, he may testify from that. Any part of a regular record kept in any occupation, whether by one or more persons, may be used on being identified by a qualified witness.
5. In testifying, the witness will ordinarily be allowed to narrate straightforwardly what he has seen or heard, uninterrupted by questions from either party.

From time to time, however, he may be stimulated by questions to speak of omitted matters. But, when the party calling him is the questioner, such questions must not be in a form calculated to suggest his precise answer; and an opposing party must not put his questions in a bullying or other manner calculated to confuse or to insult the witness.

The judge may ask any questions that he may deem useful.



6. To enable the *witness's credit* to be estimated by the tribunal a party opponent may at the proper stage (above, Section one, C; by cross-examination or by other witnesses) introduce any evidence relevant to the witness's credit.
7. The following circumstances are relevant toward estimating a witness's credit: his moral disposition, his emotional bias (due to relationship or interest in the case); his general mental capacity; his mental condition when testifying; his recollection; the conditions of his observation of the event.
8. For evidencing these testimonial traits, any other circumstance relevant to evidence one or more of them may be admitted. This includes his behavior in giving his testimony.  
An expert psychologist may testify to a witness's mental condition and testimonial trustworthiness.
9. For reasons of practical policy (above, Section three, A, paragraph one), the following ordinarily should be excluded:

- a. The accused's conviction of crime, when he is a witness
- b. A contradiction by another witness, or a self-contradictory statement by the witness himself, when either is offered by the testimony of another witness and when the matter is not material in the case

*Examples:* An action for personal injury received in alighting from a streetcar. The motorman testifies (1) that he left his home at 6 a.m., (2) that he had been on the car from 7 a.m. to 3 p.m.; (3) that five persons got off the car when the plaintiff did; and (4) that he was looking at the plaintiff when the latter alighted. A contradiction by other witnesses, or a self-contradictory statement, on (1) would not be admitted; on (2) probably admitted; on (3) and (4) certainly admitted.

But no time should be spent on petty discriminations in applying this principle.

10. To corroborate a witness's credit, any relevant circumstance may be admitted, at the proper stage (above, Section one, C). This includes his good moral character for veracity, and, particularly, a former statement made out of court, telling the same story.
11. To discredit the present claims of any party, his admissions made at any time, *i.e.*, statements or conduct inconsistent with his present assertions or those of the witnesses, may be admitted whether or not he himself has testified. This includes the admissions of any other person who is or was at some former time affected by the same interest in the issue; *e.g.*, an agent acting for a principal, a co-conspirator, a prior holder of the same property, etc.

The conduct evidencing an implied admission may include falsehood and fraud in dealing with witnesses or documents; and a failure to produce witnesses or documents may be an admission of what the testimony or document would have been if produced.

## SECTION 4

### PREFERENTIAL PRINCIPLES

Certain kinds of witnesses are "preferred" to be called; *i.e.*, should be called before any other witnesses to the particular matter are heard: *viz.*,

1. An eyewitness to a crime
2. An attesting witness to the execution of a will or other document

## SECTION 5

## DOCUMENTARY PRINCIPLES

When the *terms of a document* are in issue, the document itself (original) should first be produced. However, the witness may refer to the contents without producing it, if it is later produced.

This principle applies only to documents that are important in the case, and only when the terms of the document are material.

*Examples:* Action for eviction from an apartment. If there is no dispute on the amount of rent payable, the written lease need not be produced to evidence that amount; but if the time of giving notice to leave is disputed, the written notice itself should be produced.

If the original document cannot be produced for some reason that is satisfactory to the tribunal, a copy may be used, provided the witness can speak regarding the copy's accuracy; if the document is lost or destroyed, then he may testify from recollection.

A copy not so verified should be a certified copy (below, Section six, A, paragraph ten, if the original is an official record.

## SECTION 6

## ANALYTIC PRINCIPLES (HEARSAY RULE)

All testimony must be subject to cross-examination by the tribunal or the opponent in order to test its trustworthiness. Hence a statement reported to have been made out of court, and offered as evidence, whether written or oral, is not to be admitted.

A. This principle ceases to apply when the statement out of court was made under circumstances that indicate some degree of trustworthiness. In the following situations, therefore, a hearsay statement is to be admitted:

1. A dying statement
2. A statement mentioning some fact that is against the interest of the party making it
3. A statement about events of family history
4. A statement about old boundaries or titles
5. A written entry in any book regularly recording the doings in an occupation
6. A statement made by an injured or ill person about his condition, past or present, and the cause of it
7. A statement made by any person involved in, or by a bystander of, an affray or personal injury, and relating to that occurrence
8. A statement made by a testator of any fact relevant to an issue of undue influence or sanity or the execution or contents or revocation of his will
9. A statement made by a person regarding his intent or motive, past or present, in doing an act
10. Any official record or certificate or copy purporting to be made by any authorized official, on a matter falling within his duty
11. A statement made by any person, now deceased or otherwise unavailable as a witness, about any relevant matter on which he apparently had some personal observation
12. A treatise on matters of science or art when testified to be reliable by an expert in that branch

If the person who made one of the foregoing statements is alive and producible as a witness, he should be produced for cross-examination (except when a public official, under paragraph ten) on demand of the opponent.

B. This principle also ceases to apply where the statement offered was a deposition duly taken under process of law or a testimony given in a former trial or preliminary examination, provided that the person making it is no longer available as a witness and that he was at the time of making it subject to cross-examination.

C. This principle also does not apply to exclude statements made incidentally in the course of an affray or a business transaction or a conversation or any other event, where the complete story of what occurred calls for the recital of all that was said and done. The tribunal has discretion to admit any hearsay statement of this sort, and to avoid any theoretical quibbling on its being hearsay.

D. This principle also does not apply to exclude affidavits of the doing of procedural matters; *e.g.*, service of a summons, publication of a notice, etc.

## SECTION 7

### CORROBORATIVE PRINCIPLES

Some kinds of witnesses' statements, though admissible, should be admitted only if they can be accompanied by corroborative evidence. This includes:

- A. Testimony of an accomplice in a criminal case
- B. Testimony of a woman or a child accusing a man of a sex offense
- C. Testimony of a party to a divorce suit, alleging or admitting a ground for divorce
- D. Testimony of a plaintiff suing on a money or property claim based on a transaction with a person now deceased or incompetent, or with a corporation agent now deceased or incompetent

## E. Confession by an accused of the crime now charged

However, the principle of evidence is to be liberally applied, for some witnesses of the above sorts may be credible without other evidence.

## SECTION 8

## PRINCIPLE OF VERBAL COMPLETENESS

When a document or oral statement is to be evidenced, the whole of the document or the oral statement should be evidenced in the first instance, if feasible, unless the tribunal rules that this is a needless precaution.

If the whole is not thus put in, the opposing party may put in the remainder, so far as it helps to complete or clear up the meaning of the part first put in.

## SECTION 9

## PRINCIPLE OF AUTHENTICATION

Every written document offered in evidence must first be authenticated; *i.e.*, evidenced to have been made by the person purporting to make it.

A. The foregoing principle is satisfied, without further evidence, in the following classes of cases:

1. A document whose contents evidence circumstantially the probable author
2. A document that has existed thirty years or more in the natural place of custody
3. A document now found in public office or in a business house, and appearing to be a part of the regular records in that place

4. A document bearing what purports to be the official seal of the state custodian of records of a foreign State; or of the state custodian of records or the clerk of any superior court of any state of the United States or other United States jurisdiction; or of the custodian of records of any state or county office of the forum state, or of the custodian of records of any office of the forum city.

B. The foregoing principle applies equally to *chattels*; i.e., when any chattel is offered as purporting to have come from any place or person, it must be explicitly evidenced to be that identical chattel.

*Examples:* A charge of homicide, an issue being whether the bullet came from the gun of *A* or the gun of *B*. A bullet purporting to be the one found in the deceased's body being produced in court, it must be authenticated by the testimony of every person who has had custody of it in the interval—surgeon, nurse, police officers, etc.

## SECTION 10

### PRINCIPLES OF PRIVILEGE

A. *Exemption from attendance.* Reasons of extrinsic policy must sometimes limit the quest for evidence, creating exemptions for certain classes of persons or facts.

1. A witness need not attend to testify unless he is first given adequate notice, by subpoena or otherwise
2. He need not attend if travel beyond a certain distance would be required
3. Personal inconvenience to his business or family affairs does not exempt him from attendance

In the cases of paragraphs one and two he must, nevertheless, testify at his domicile.

B. *Privileged facts.* A witness need not

1. Disclose any criminal conduct of his own
2. Testify to any criminal conduct of wife or husband
3. Disclose a secret of his business
4. Disclose a matter of private personal or family condition or history

The tribunal, however, may in discretion exceptionally require a disclosure of any such matter, except under paragraph one.

C. *Privileged communications.* A witness need not disclose

1. A confidential communication made or received by wife or husband
2. Information confidentially and voluntarily given to a prosecuting officer
3. Information confidentially given under compulsion of law to an administrative officer
4. A communication confidentially made or received by a military or naval officer
5. A communication confidentially made in consultation between attorney and client

## SECTION 11

## PRINCIPLES EXEMPTING FROM EVIDENCE

A. *Formal admissions.* A fact formally admitted by the opposing party to be a fact need not be evidenced. Such a formal admission may be made

1. By the parties' mutual stipulation before trial, or
2. By the opponent's formal statement during trial, if made either in writing or in the judge's presence orally.



The judge may call upon opposing counsel to state whether his party in good faith disputes a fact, in issue or relevant; if the party does not, the fact need not be evidenced.

B. *Notorious facts*. Where a fact is in the tribunal's opinion so notorious that no dispute of it could be made in good faith, or is easily ascertainable by reference to some undisputed source of information, the tribunal may dispense with any evidence of it.

This principle applies ordinarily to include matters of

1. state political organization
2. commerce
3. general science
4. local government

but may be applied to any matter whatever.

However, this principle does not forbid the opposing party from adducing evidence to the contrary, when in good faith he disputes the alleged fact.

## SECTION 12

### TRIAL JUDGE'S RULINGS

A. The trial judge's ruling is *not final*, in so far as his statement of *the tenor of any of the foregoing rules of law* is objected to as erroneous.

B. The trial judge's ruling is final

1. In the *application* of any rule of evidence to a particular offer
2. In the finding of any facts preliminary to the application of a rule

C. Hence, no appeal will lie from a ruling on a point of evidence unless the party dissatisfied with the ruling has first requested the judge to state the *terms of the rule of law* as applied by him, so that the appeal can be limited to the ground of paragraph A above.

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## NOTES

<sup>1</sup> Address at Boston, 1897.

<sup>2</sup> Address at the Fifth Conference of the Fourth Judicial Circuit, June 6, 1935 (1935)  
21 A. B. A. J. 404, 407.

<sup>3</sup> The substance of this Summary, originally intended for prior publication in the present volume, has recently appeared in WIGMORE, *STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE* (1935). As revised, it is here offered from a different point of view and to a different body of readers.

# THE IMPLEMENTING OF ARBITRATION STATUTES

NATHAN ISAACS

## THE PRESENT TASK IN ARBITRATION LAW

IF we could look at the history of commercial arbitration in the United States from the vantage point of the future, I am inclined to think we might characterize the present stage as the period of the implementing of the modern statutes. Behind us, and running back for a century, future historians will see a long, uneventful period of quiescence or even decadence, a period in which the law discouraged arbitration. In this earlier period they will find a series of doctrines strangely at variance with the spirit of *laissez faire* and of freedom of contract prevailing at the time in other divisions of business law. Whole classes of agreements to arbitrate are held against public policy and void as "ousting the court of its jurisdiction." Submissions are held revocable to the last minute of rendering an award, and a hostile court is ready to review the award of arbitrators on the slightest pretext. It is typically a period of that irony of fate which forces the man who takes pains to avoid litigation on the substance of his claim to fight in court over the merest shadow: the question whether or not the procedure under which he has won can stand. This unpromising period ends in the legislation still in process of development, of which the New York Act of 1921 may be taken as the model. The new legislation has many features, but essentially only three of them are sufficiently prominent to stand out in the kind of distant survey that will interest our future historian: the making of written agreements to arbitrate valid, enforceable,

and irrevocable; the extending of their application to matters not yet in dispute; and the rendering of court aid possible in various details of procedure and enforcement.

Whatever the advocates of such legislation may have hoped for, the historian, it seems, will not be able to record any immediate response in the number of cases arbitrated, any sudden relief of crowded court calendars, any new meaning of arbitration in business life. No difficulty will be experienced by him in explaining this reluctance to change habits on the part of lawyers and litigants. He may single out the vested interests or the conservatism of the legal profession, the ignorance or canniness of the business man, the reasonableness of experimenting with small things first, and perhaps, when viewed from an unemotional distance, the general fitness of the courts for their everyday tasks in spite of occasional shortcomings. He may also find that the very nature of the subject has prevented available statistics from showing the real progress that was being made. But, it is submitted, the principal explanation will remain that the statutes were devoid of the necessary implements for making them immediately useful.

#### THE NATURE OF IMPLEMENTING

Implementing may be illustrated more easily than it can be defined.

1. A simple order of procedure may serve as a first illustration. Persons who have agreed to arbitrate may be at a loss to know what to do next, or even "whose move" it is, at any stage from the first suggestion of a breach of contract until the final adjustment of a dispute.

2. Even when the next step is indicated in the original contract or article of submission, it may leave the layman quite awed. Suppose, for example, he is expected to give "notice" of a

claim or make a "demand" for arbitration. The doubts raised in his mind are often sufficiently formidable to drive him to his lawyer or to procrastinate until it is too late to take advantage of the arbitration plan. The importance of simple, understandable, available, and safe forms thus constitutes a second phase of the work of implementing.

3. A third phase is reached in the all-important task of choosing arbitrators. The ordinary procedure, of course, is to have each side select a representative and the two thus selected choose a third. There are obvious difficulties and defects in such a system. In the first place, it tends to make two of the arbitrators partisans rather than judges. Again, it may cause a struggle to center upon the choice of an arbitrator in a contest in which assumptions of probable sympathies of the candidates are freely indulged in. Implementing by means of creating panels or furnishing the aid of impartial boards, committees, or consultants may go far to overcome these difficulties.

4. Implementing may include the furnishing of many other desiderata: for example, a fitting place, trained clerks, impartial keepers of records, stakeholders of things in controversy, and much else that our courts furnish at no little cost.

5. Finally, implementing includes the establishment of standards of conduct. It may be quite immaterial whether attorneys are admitted to the hearing or excluded, whether witnesses are separated or not, whether hearings are formal or informal, whether the traditional rules of evidence are applied or not, whether continuations are allowed on request or not, whether arbitrators may conduct their own investigations outside of the hearings or not; but it is quite material that some rules of the game be available, in order to avoid eternal bickerings about the rules themselves. In a word, something akin to parliamentary law and for much the same purpose is required.

Of course the importance of what is here called implementing is not limited to statutory arbitration, nor indeed to arbitration in general. Any permissive law is likely to be a dead letter for lack of it. Permission is not synonymous with opportunity. If under common-law arbitration there had existed the equivalent of a Cushing's *Manual of Parliamentary Practice* or a *Robert's Rules of Order* specifically for arbitration proceedings, the history or at least the statistics of commercial arbitration might have been more impressive. In any event, we may look critically at the statutes to see what they have done toward supplying their own apparatus and what they have left to be worked out by the courts or by private initiative.

#### METHODS OF IMPLEMENTING: POSSIBLE AND ACTUAL

The theoretical possibilities for supplying an arbitration statute with working apparatus are numerous and, as all of them appear in one combination or another, a listing for analysis may be helpful.

1. In the first place, a statute may itself describe and create the implements for its execution. Some of the older statutes were in fact limited to just such points.

2. Theoretically a statute might provide for an administrative body to draw up rules and supply apparatus. This scheme is common in industrial arbitration, where an old or a new administrative board has been called on to facilitate or supervise the hearings. Some of the statutes on commercial arbitration reach out toward the idea by giving courts functions of the kind, but there are obvious limits beyond which the intercession of the courts is inconsistent with the main advantage of arbitration.

3. Again, implementing may be left to private initiative. By and large, this is the method of the modern arbitration statutes. It presupposes either a definite contract between the parties,

covering all doubtful points of procedure, or a tacit assumption of a regular way of proceeding, which might be called the custom or common law of arbitration, applicable in so far as not inconsistent with the terms of the statute or of the contract.

The silence of the statutes on these matters has not had the effect of completely destroying their usefulness. They have been saved, in the first place, by the implementing tacitly and even thoughtlessly carried over from the traditions of litigation. In ordinary situations, both the parties and the arbitrators assume the attitudes and expect the treatment that they would receive in court. They try to frame an issue and to stick to it. It is taken for granted that irrelevancies will be avoided. There is, however, a limit to the effectiveness of such assumptions which is soon reached. The difficulties are entirely parallel to those that have developed in another modern attempt to simplify the procedure of litigation; namely, notice pleading. In simple cases of well-known types it has been found entirely satisfactory to substitute a mere notice for the formal and formidable traditional documents in which claims and defenses are brought before courts. An explanation of the success of this substitution is that in a simple case, such as a streetcar or automobile accident, the allegations have become standardized so that any one familiar with the practice of that branch of the law can easily formulate all the regular allegations of negligence and the counter-allegations in the nature of denial or contributory negligence, and proceed to prepare for trial. Where, however, the extraordinary type of case comes up, or a novel situation is encountered, this kind of pleading—or absence of pleading—completely fails. In arbitration, too, there is a vast difference between the simple assumptions that may safely be indulged in where the purchaser of coffee or silk or leather alleges that the shipment is not up to standard and the more complicated type of case in which an

exceedingly careful statement by both sides is necessary to confine the issue to manageable proportions. A single illustration taken from life may illustrate the matter. The members of one family, consisting of a father and four sons, have been engaged for many years in the real-estate and construction business. They have entered into many ventures, sometimes individually but more often in groups of two or three. Their capital and credit they have very freely made available to each other, sometimes on a profit-sharing basis, at other times on an interest basis, and most often on a simple basis of charges and countercharges, cleared up or partly cleared up in occasional settlements. At length one of their ventures turns out to be exceedingly profitable. Now the question arises: Was it an individual venture of one of the members of the family or a partnership undertaking? If a partnership undertaking, who were the lucky partners? And what other ventures must it be linked up with? In the actual hearing of such a case, in the absence of clear issues, the arbitrator adopted the plan of permitting each member of the family to tell his own story in his own way. This *Ring and the Book* method no doubt had its advantages. Perhaps the chief need of the occasion was just such a safety valve for the blowing off of steam. But it also had its disadvantages. The discursiveness of some of the witnesses knew no limits, and the arbitrator could hardly suggest that any part of the story was not potentially relevant. Furthermore, new issues were injected as the stories were unfolded, and it became clear that it would be exceedingly difficult to criticize as not responsive to the issues almost any awards that might eventually be made. From a practical point of view, the loss of time, the danger of obscurity, the tendency to stir up animosities, and, in general, the uncertainties of such a procedure cast a serious doubt on the usefulness of arbitration.

In such complicated cases, private initiative has found escape



from chaos in carefully drawn submissions. These frequently state not only the issues but also the practical rules of evidence and sometimes concessions or admissions by the parties. It is difficult to draw such submissions in a manner that will please both sides, even where both sides are represented by able counsel. It is exceedingly dangerous to copy them from case to case or from a form book, precisely because they go into those peculiar phases of cases that most distinguish one from another. In any event, it is impossible to draw a sufficiently comprehensive submission to implement adequately by providing for every possible contingency that may arise in the course of a hearing. If it were possible, it would be at least a great waste of time to do this for every case, and the process of negotiation leading up to it would, from a psychological point of view, be destructive of the opportunity to arbitrate—hence the emergence and the importance of organized efforts to supply the necessary implementing through outside organized agencies.

#### A CHALLENGE OF SELF-GOVERNMENT

This silence of the statutes, in a word, has served as a challenge to business organizations: chambers of commerce, stock and produce exchanges, trade associations including so-called guilds and institutes, and, finally, arbitration associations. Of course, the arbitration activities of such associations and also of religious, fraternal, and civic bodies were in progress long before the statutory changes that we are considering. What is new is the extent and significance of their aids, and their adjustment to take advantage of the statutes, rather than any radical invention. The largest single contribution is that of the American Arbitration Association, which has just issued its report of ten years of activity. A great part of this activity, to be sure, has been of a preliminary nature: propaganda, education, research and experimenta-

tion, the drafting and advocating of statutory changes. But its most noteworthy work at the end of the period and in all probability for the period immediately ahead of us is precisely the implementing with which we are here concerned. The Association has promulgated rules calculated to serve as neutral rules of the road and as guideposts for ordinary commercial disputes. While it may generally be assumed that any rule is better than no rule and that, in general, simplicity is to be preferred to finesse and clarity to technical accuracy, there are as many problems involved in the preparation of a code as six hundred years of case law, court rules, and statutes have worked out for Anglo-American court procedure. In the main they are related to the very question, How far should arbitration be allowed to neglect or avoid the formalities that have grown up for litigation? The illustration of the family partnership already described is relevant here.

The American Arbitration Association has utilized an abundance of day-by-day experience as a basis for codification. Departing from the practice of most trade associations and chambers of commerce, it has put into its rules and into the rest of its apparatus enough of the flavor of the courtroom to encourage the participation of lawyers and to tend to bring about, so far as possible, the actual result that procedure at law would produce eventually. In most closed organizations whose tribunals are open to members only, there is a strong tendency to compromise rather than to decide disputes.

#### ARBITRATION AND SUBSTANTIVE RULES

Of course, where compromise is indulged in frankly it would be highly improper to use any decision as a precedent. In fact, something is gained by secrecy. Even where compromises are avoided it is dangerous to use the decisions of arbitrators as precedents in similar cases involving different litigants. Yet they are

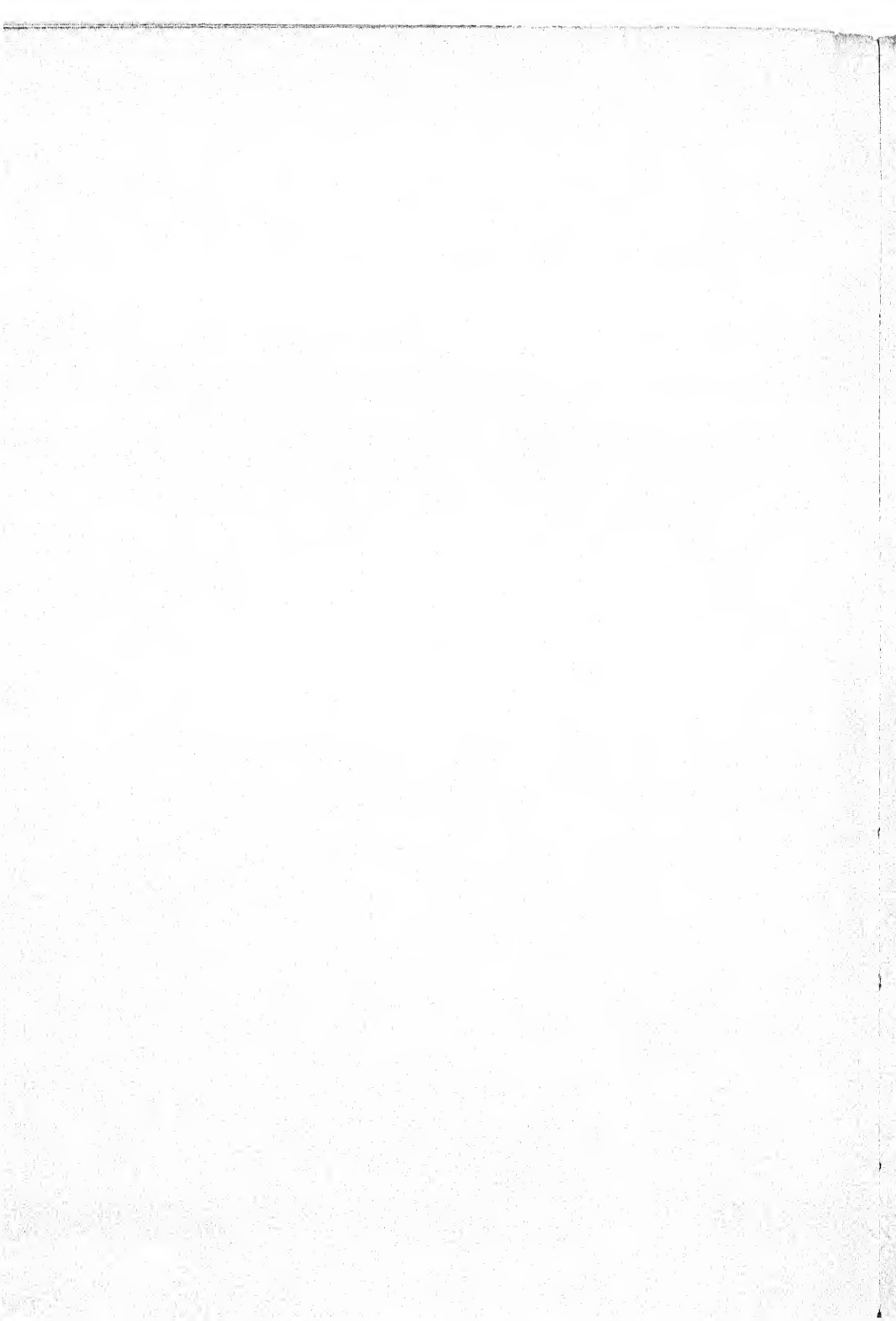
so used. In connection with the Actors' Equity Contract, for example, in which disputes over the same matters are constantly recurring, such a question as what constitutes ordinary clothing to be furnished by the actor and what constitutes a special costume tends in course of time to be answered in the acting fraternity on the basis of decisions that are rapidly whispered back and forth, and answered quite as effectively as on the basis of court decisions in more ponderous matters. It is not merely that an old award is cited in a new arbitration by way of argument; knowledge of a series of awards might well prevent the raising of a question again in a new dispute. Some trade associations are just as much interested in formulating their developing customs as they are in settling past disputes; these groups have with a moderate degree of success proposed methods for the study of decisions, with a view to stamping some with approval as correct statements of business custom. Other associations, without taking any action so formal, run arbitration columns in their trade papers or otherwise publish the awards of arbitrators, and thereby tend to produce a somewhat similar practice of *stare decisis*.

The supplying of standards in this way may indeed go far beyond the mere implementing of arbitration plans. Theoretically, at least, such business customs can just as well be brought into court through competent witnesses. There is, however, an advantage in the directness and specific detail involved in their application by the arbitrators of a trade association that is entirely lacking when the custom must pass through the considerations of a judge and a jury, neither cognizant of nor necessarily sympathetic with the custom in question. It is, moreover, exceedingly helpful to have either a body of precedents or an officer or committee in authority to answer questions not merely of procedure but of substance. Of course, the distinction here, as in the law courts, between adjective and substantive law is more

theoretical than real. Either type of question may develop into an impasse in an ordinary arbitration procedure.

#### TASKS AHEAD

The foundation of the arbitration of the future will have to be its satisfactory working. Propaganda or education may interest people in it. Compulsory clauses in the constitutions of trade associations may compel experimentation with it. Legislation may shape it. But in the end it will be established only for those cases or situations in which it works smoothly. Whether these situations are few or numerous depends, in the current stage of the history of arbitration in this country, on the way the laws are implemented. Progress has been made, but a great deal of experiment lies ahead of us. We cannot safely rely on the experience of any individual or group or even of any foreign country. The very condition that has made any arbitration possible here—the readiness with which we take the main principles of the common-law procedure for granted—militates against foreign borrowings or original schemes that work here or there. The ideal condition for a really useful arbitration plan in the world of business is thus still far off. But it can be envisioned. It will involve the possibility of selecting by simple reference some well understood and acceptable implementation in every contract or submission and proceeding under it so surely and expeditiously that substance can be handled with a minimum of concern about form.



# INDEX FOR VOLUME ONE

A COMPLETE INDEX MAY BE FOUND IN VOLUME THREE

	<i>Page</i>		<i>Page</i>
Action, forms of, in England	210-211	Admissions . . . . .	367-368
Administration of justice, Eng-		Alternate jurors in federal	
lish reforms in . . . . .	275-279	criminal procedure . . . . .	332-333
Administration of justice in		American Bar Association:	
America, inefficiency in	280-282	activities and program . . . . .	129-187
Administrative agencies:		administrative law, com-	
judicial powers of . . . . .	133	mittee on . . . . .	122, 124, 132
number of . . . . .	124	as representing traits of	
Administrative court, federal	138-139	typical lawyer . . . . .	169-172
Administrative law:		code of ethics . . . . .	183
American scholars of . . . . .	120	early development of . . . . .	172-178
constitutional aspects of . . . . .	121-133	government of . . . . .	166
desirability of . . . . .	118, 119, 134, 135	national issues, effect on . . . . .	185-186
economics and sociology with		personalities in, early . . . . .	176-178
respect to . . . . .	123	plan pendings . . . . .	159-160
existence denied . . . . .	117	publications of . . . . .	186
financial depression, effect		standards in legal education,	
on . . . . .	122-124	effect on . . . . .	181-183
German . . . . .	99-100	uniformity of laws, attempt to	
growth of . . . . .	117	encourage . . . . .	184
judicial review in . . . . .	137-139	voluntary type organization, as	
legislation with respect to . . . . .	121	a . . . . .	157
private rights, effect on . . . . .	121	American law, common law as	
special committee on, of		basis of . . . . .	14-15
the American Bar Associa-		American Law Institute:	
tion . . . . .	122, 124, 132	contributions of . . . . .	196-202
World War, effect on . . . . .	122, 124	criticism of, refutation of	197-199
Administrative legislation, publi-		future program, plans for	202-205
cations . . . . .	132	Arbitration Association, Ameri-	
Administrative officers:		can contribution of . . . . .	376-377
French remedy against . . . . .	140	Arbitration law:	
liability of . . . . .	140	implementing in, methods	
nonsuability of the state for . . . . .	140	of . . . . .	373-376
wrongs committed against pri-		implementing in, nature of	371-373
ivate persons by . . . . .	139-141	present problem in . . . . .	370-371
Administrative tribunals:		stare decisis in . . . . .	377-378
advantages of . . . . .	118, 119, 134, 135	task ahead . . . . .	379
disadvantages of . . . . .	135	Argentine, Civil Code of 1869 . . . . .	52

	<i>Page</i>		<i>Page</i>
Association of American Law		Chancery for upper Canada,	
Schools . . . . .	122	court of . . . . .	32
admission requirements of . . . . .	111	Chancery jurisdiction, dis-	
Bar, standards of admission to, in		trust of, early American . . . . .	218-219
nineteenth century . . . . .	15-16	Chancery procedure, English	
Bar associations:		nineteenth century . . . . .	215-217
Canadian, development of . . . . .	31	Chile, Civil Code, 1855 . . . . .	51
forerunners of . . . . .	15	Circumstantial evidence . . . . .	355-358
integrated . . . . .	156, 157, 158, 159	Civil procedure:	
representation, necessity for . . . . .	155	changes in . . . . .	258
voluntary . . . . .	155-156	in America . . . . .	263-264
<i>see</i> American Bar Association		transition in, in America	
Bar organization, principles of . . . . .	153-155	and England . . . . .	221-222
Bar, services of . . . . .	195	Code pleading, reasons for	
Brazil, Code of 1916 . . . . .	55-57	slowness in acceptance	
Brazilian law, Portuguese law		of, in America . . . . .	238-239
as basis of . . . . .	46	Coinage, German, develop-	
Brookings Institution . . . . .	121	ment of . . . . .	94-96
Burden of proof . . . . .	351-353	Common law, American law	
Bustamante Code, 1928 . . . . .	65-66	based on . . . . .	14-15
Calendar congestion:		Common law crimes, con-	
in Massachusetts . . . . .	290	troversy over . . . . .	302-304
in New York, attempt to rem-		Commonwealth Fund . . . . .	121
edy . . . . .	286-289	Comparative law in Latin	
Canada, Dominion of, powers of . . . . .	25-38	America, importance of . . . . .	63-64
Canadian Bar Associations, de-		Comparative method of study . . . . .	120
velopment of . . . . .	31	Constitution, United States:	
Canadian courts, overcrowding		crimes provided by . . . . .	297
of . . . . .	28-29	effect on criminal law . . . . .	296
Canadian judges, tenure of . . . . .	34	Constitutional aspects of ad-	
Case system in American legal		ministrative law . . . . .	121-133
education . . . . .	110-111	Corroboration of statements	
Causes of action:		of witnesses . . . . .	364-365
joinder of, American com-		Counterclaim, development	
mon law of . . . . .	229-230	of, in America and Eng-	
joinder of, American law of . . . . .	232	land . . . . .	233-235
joinder of, English inno-		Course system in American law	
vation in . . . . .	230-232	schools, introduction of . . . . .	108-109
several, resulting from		Courts:	
same facts . . . . .	240-241	administrative, federal . . . . .	138-139
		Canadian, appeal from . . . . .	33, 34-35
		calendars, congestion of . . . . .	21-23

# INDEX

383

<i>Page</i>	<i>Page</i>
organization of American . . . 16-17	waiver of trial by jury . . . 338-339
Quebec, overcrowding of . . . 28-29	<i>see</i> Federal criminal procedure
upper Canada, Court of Chancery for . . . . . 32	Criminal prosecution, federal,
Credibility of witnesses . . . 360-361	quality of . . . . . 324-325
Crimes:	
provided by United States Constitution . . . . . 297	Declaratory judgments, development of . . . . . 257-258
under commerce clause . . . 272	Defenses, equitable, in law action 228
Crimes Act of 1790, first federal 301-302	Delegation of powers . . . 126-131
Criminal jurisdiction, federal:	Dicey . . . . . 117, 118, 134, 140
bases of . . . . . 299-300	Discovery, in England and America . . . . . 243-246
common law crimes not specified, controversy over . . . 302-304	Disputes, settlement of, in colonial Latin America . . . 47-48
extension of, to state crimes 308-310	Documentary evidence, authentication of . . . . . 305-366
fictional . . . . . 304-305	Documentary principles . . . 362
incidental . . . . . 314	Documents, foreign, in federal criminal procedure . . . 334-335
inferential . . . . . 306-308	Donoughmore
limitations on . . . . . 297-298	Committee . . . 132, 136, 138, 140
narcotic addiction . . . . 321-322	
Penal Code of 1909, defined by . . . . . 311-317	Economics and sociology with respect to administrative law 123
pure foods and drugs . . . 320-321	Entries made in regular course of business in federal criminal procedure . . . . . 334
sovereignty controversy, the . . 325	Equitable defenses in law action . 228
white-slave traffic . . . . 319-320	Equity, <i>see</i> Chancery titles
Criminal law:	Error and Appeal, Canadian Court of . . . . . 33
German . . . . . 96-98	Ethics, American Bar Association code of . . . . . 183
Latin American . . . . . 60-63	Evidence:
Criminal law, federal, effect of Constitution on . . . . . 296	admissions . . . . . 367-368
historical background . . . 300-301	burden of proof . . . . . 351-353
Criminal procedure, federal:	circumstantial . . . . . 355-358
after verdict . . . . . 333	corroboration of witnesses 364-365
basis of . . . . . 328-331	credibility of witnesses . . . 360-361
defendant as a witness . . . 335-336	documentary principles . . . 362
direct appeal to Supreme Court 336	hearsay rule . . . . . 362
grand jury . . . . . 336-337	
husband and wife as witnesses . . . . . 339-340	
legislation, proposal . . . . 341	
code of, proposed . . . . . 196-197	
search and seizure . . . . 331-332	



	<i>Page</i>		<i>Page</i>
notice . . . . .	351	German currency, development	
notorious facts . . . . .	368	of . . . . .	94-96
preferred witnesses . . . . .	361	German union, early ineffective-	
presumptions . . . . .	352	ness of . . . . .	88-89
privileged faces and communi-		Germany:	
cations . . . . .	367	administrative law in . . . . .	99-100
process . . . . .	352	commercial law, development	
proposed principles for, non-		of . . . . .	92-93
jury trial order of presentation		consolidation of . . . . .	86-88
of . . . . .	353	Napoleonic codes, effect on . . . . .	85
principles of, definitions and		political developments in last	
classification of . . . . .	354-355	century . . . . .	83
rules of, present state of . . . . .	347-348	political situation in 1836 . . . . .	83-84
testimonial . . . . .	358-359	race problem in . . . . .	98-99
testimony, order of . . . . .	353	separation of powers in . . . . .	89-90
trial judge's rulings as to . . . . .	368-369	unification of civil law . . . . .	100-102
Federal criminal procedure:		Goodnow . . . . .	120, 121, 122
after verdict . . . . .	333	Hearsay rule . . . . .	362
alternate jurors in . . . . .	332-333	Holmes . . . . .	127
defendant as a witness . . . . .	335-336	Hughes . . . . .	129, 133, 134, 137
direct appeal to Supreme Court . . . . .	336	Implementing:	
foreign documents in . . . . .	334-335	methods of, in arbitration	
grand jury . . . . .	336-337	law . . . . .	373-376
husband and wife as wit-		nature of, in arbitration	
nesses . . . . .	339-340	law . . . . .	371-373
legislation, proposed . . . . .	341	Integrated bar associa-	
search and seizure . . . . .	331-332	tions . . . . .	156, 157, 158, 159
waiver of jury trial in . . . . .	338-339	International law in Latin	
witnesses in foreign coun-		America . . . . .	64-67
tries . . . . .	333-334	Interstate commerce clause, fed-	
writings in regular course		eral crimes under . . . . .	272
of business . . . . .	334	Interstate compacts:	
Federal Register Act . . . . .	132	criminal law and . . . . .	323-327
Frankfurter . . . . .	120, 121, 122	New York State, legisla-	
Fraudulent use of the mails . . . . .	322-323	tion in . . . . .	327-328
Freund . . . . .	121, 122		
German Constitution of 1919 . . . . .	89-91	Joinder of causes of action, <i>see</i> Causes	
effect of Nazi regime . . . . .	91	of action	
German criminal law, metamor-		Judges:	
phosis of . . . . .	96-98	Canadian, tenure of . . . . .	34

# INDEX

385.

	<i>Page</i>		<i>Page</i>
rulings, trial . . . . .	368-369	law, establishment of, by	
status of American . . . .	279-280	conquerors . . . . .	40-41
Judgments:		mercantile codes in . . . .	59-60
common law, in law and		movement for independ-	
equity . . . . .	252-254	ence in . . . . .	49-50
partial . . . . .	254-255	penal law in . . . . .	60-63
Judicature Act of 1873, English	276	Spanish law brought by con-	
Judicature for Ontario, Supreme		querors to . . . . .	41-42
Court of . . . . .	34	status of, at time of conquest	43-44
Judicial councils:		system of law, crisis in . .	58-59
composition of . . . . .	292-293	<i>see</i> specific countries	
Ohio . . . . .	283-284	Latin American Codes, nine-	
purposes of . . . . .	285	teenth century . . . . .	51-55
recommendations of New		underlying concepts of . .	53-55
Jersey . . . . .	285	Latin American municipalities,	
Judicial powers of administra-		early . . . . .	45-46
tive agencies . . . . .	135	Law:	
Judicial review of administrative		Latin American, early . . . .	44
decision . . . . .	137-139	laws, distinguished from . .	8
Jury trial under merger of law		nature of, in society . . . .	193
and equity . . . . .	226-227	Law, American:	
Justice:		bases of . . . . .	24-26
administration of, in Latin		creative period . . . . .	17
American colonies . . . .	46-47	development of . . . . .	17-24
ministry of, proposed . .	282-283	organizing and systematizing	
King's Bench for Upper Canada,		period of . . . . .	18
Court of . . . . .	30	present outlook . . . . .	20-24
powers of . . . . .	31	reshaping, period of . . . .	19-20
judges of . . . . .	32	Law and equity:	
Latin America:		fusion of . . . . .	223-229
administration of justice in		background of . . . . .	222-223
colonial . . . . .	46-47	jury trial under merger of	226-227
comparative law in, impor-		separation of courts of, in	
tance of . . . . .	63-64	England . . . . .	209-210
disputes, settlement of, in		Law schools, influence of . .	3-5
colonial . . . . .	47-48	Lawyers:	
international law in . . . .	64-67	American, general char-	
law based on Spanish law .	39-49	acteristics of . . . . .	169-172
law, early . . . . .	44	attitude of public toward .	191-192
		early lack of, in Canada . .	31
		necessity for . . . . .	8-9
		place of, in community	148, 149, 191

	<i>Page</i>		<i>Page</i>
position of, change in . . .	146-147	Mercantile codes in Latin	
prejudices against, in America,		America . . . . .	59-60
reasons for . . . . .	9-12	Mexico, Civil Code of 1870 . .	51-52
<i>see</i> Legal profession		Montesquieu . . . . .	125
Legal education:		Municipalities, Latin Amer-	
administrative law, course		ican, early . . . . .	45-46
in . . . . .	122-123	Napoleonic Codes, effects in	
American Bar Association,		Germany. . . . .	85
effect on . . . . .	181-183	Narcotic addiction as a fed-	
case system in . . . . .	110-111	eral crime . . . . .	321-322
course system of teaching,		National issues, effect of	
introduction of . . . . .	108-109	American Bar Associa-	
early methods of . . . . .	104-105	tion on. . . . .	185-186
graduate . . . . .	113-115	Nazi regime, effect on German	
history of . . . . .	104-116	Constitution of 1919 . . .	91
influence of . . . . .	3-5	New Jersey Judicial Council,	
in nineteenth century . . . .	13	recommendations of . . .	285
library, necessity of . . .	114-115	New York, calendar conges-	
Litchfield School . . . .	105-106	tion in, attempt to	
methods of teaching . . . .	112	remedy. . . . .	286-289
New York University School		New York University School	
of Law, contribution of . . .	108	of Law, contribution of. .	108
requirements of early law		Nonsuability of the state for acts	
schools . . . . .	107-108	of administrative officials .	140
treatises in early, use of .	106-108	Notice . . . . .	351
Legal profession:		Notorious facts. . . . .	368
changing conditions in . .	149-151	Ohio Judicial Council . .	283-284
government control, as		Ontario Judicature Act, 1881 .	33-34
tending to undermine		Overcrowding of bar, result of .	116
independence of . . . .	160-162	Partial judgments . . . .	254-255
hazards of. . . . .	151-152	Penal Code of 1909, Federal	311-317
larger cities, in the . . .	152-153	Congressional Joint Com-	
meeting problems of the .	162-165	mittee, work of . . . .	313-315
overcrowding of . . . . .	116	Peru, Civil Code of 1852. . .	51
present aspects of . . . .	147-149	Pleading:	
<i>see</i> Lawyers		American and English,	
Litchfield School . . . .	105-106	reform in . . . . .	235-237
Logan Bill . . . . .	138-139	common law, in England	211-215
Maitland . . . . .	120, 125, 134	English, effect on American	
Marshall . . . . .	127	rules of . . . . .	242
Massachusetts, calendar conges-			
tion in . . . . .	290		

# INDEX

387

<i>Page</i>	<i>Page</i>
Pollock . . . . . 134	Set-off, in a legal action . . . . 220
Pound . . . . . 124	Sovereignty, federal criminal law, controversy over . . . 325
Powers, delegation of . . . 126-131	Spanish law, as basis for Latin American law . . . 39-49
Preferred witnesses . . . . . 361	status of, at time of conquest 41-42
Presumptions . . . . . 352	<i>Stare decisis</i> in arbitration law . . . . . 377-378
Privileged facts and communica- tions. . . . . 367	Summary judgment . . . . 256-257
Problems of the legal profession, meeting the . . . . 162-165	Taxing power, as basis for federal jurisdiction in narcotic addiction . . . 321-322
Procedure, <i>see</i> Civil procedure	Teaching law, methods of . . . 112
Procedure, rules of, court's power to make . . . . . 292	Testimonial evidence . . . . 358-359
Process . . . . . 352	Testimony, order of . . . . . 353
Provinces, Canadian, power of 35-38	Treason, constitutional definition of . . . . . 297
Pure foods and drugs under federal criminal juris- diction. . . . . 320-321	Treatises, American legal ed- ucation, use in early . . 106-108
Race problem in Germany . . 98-99	Uniformity of laws, attempt to encourage, by American Bar Association . . . . . 184
Relevancy, principles of . . . 353-361	Verdicts: general . . . . . 250-251 special . . . . . 249-250 types of, development of . . 247-249
Requests, courts of . . . . . 30	Verifications, development of . . 255
Restatement of the law: American Law Institute's . . 197 annotations of . . . . . 199-201	Witnesses in foreign coun- tries, federal criminal procedure as to . . . . 333-334
Restraint of trade, federal criminal jurisdiction of . . . 323	
Rights, private, effect of administrative law on . . . 121	
Search and seizure, federal procedure in . . . . . 331-332	
Separation of powers: England . . . . . 131-134 Germany . . . . . 89-90 United States. . . 125, 126, 133, 137	

